Supreme Court, U. S.
FILED
FEB 21 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1190

ALL ISLAND DELIVERY SERVICE, INC.,
FEUER TRANSPORTATION, INC.,
JOHN A. JUNGERMAN SON, INC.,
PINTER BROS., INC.,
TROIANO EXPRESS CO., INC.,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Of Counsel:

REA, CROSS & AUCHINCLOSS
700 World Center Building
918-16th Street, N.W.
Washington, D.C. 20006

BRYCE REA, JR.
DAVID H. COBURN
918-16th Street, N.W.
Washington, D.C. 20006
(202) 785-3700
Counsel for Petitioners

February 21, 1978

TABLE OF CONTENTS

Page

Citation to Opinions Below 2
Jurisdiction 2
Questions Presented 2
Statutory Provisions 3
Statement of the Case 3
Reasons Why Writ Should Be Granted 7
  The Decision of the Court of Appeals Conflicts with Decisions of this Court 8
  The ICC's Order Violates the Congressional Regulatory Scheme 10
Prayer 14

TABLE OF CASES

Page

Bates v. *State Bar of Arizona,* ____ U.S. ____, 53 L. Ed. 2d 810 (1977) 8,9

Brotherhood of Trainmen v. *Virginia,* 377 U.S. 1 (1964) 8

California Motor Transport v. *Trucking Unlimited,* 404 U.S. 508 (1972) 3,8,9,10

Eastern Railroads Presidents Conference v. *Noerr Motor Freight,* 365 U.S. 127 (1961) 7,9,10,13

Franchise Realty, Etc. v. *S. F. Loc. Joint Exec. Bd.,* 542 F. 2d 1076 (9th Cir. 1976), *cert. den.,* 430 U.S. 940 (1977) 10

Middle Atlantic Conference—Agreement, 283 I.C.C. 683 (1951) 5

NAACP v. *Button,* 371 U.S. 415 (1963) 8

Rate Bureau Investigation, 559 F. 2d 1251 (1977), aff'd on reh., 565 F. 2d 290 (1977) 2,3,5

United Mine Workers v. *Pennington,* 381 U.S. 657 (1965) 9,10

Virginia Pharmacy Board v. *Virginia Consumer Council,* 425 U.S. 748 (1976) 8

Western Traffic Association Agreement, 276 I.C.C. 183, 212 (1949) 12

INTERSTATE COMMERCE ACT:

Section 5a, 49 U.S.C. § 5b 2,5,11,12

Section 5a(2), 49 U.S.C. § 5b(2) 8

Section 216(b), 49 U.S.C. § 316(b) 4

Section 216(d), 49 U.S.C. § 316(d) 4

Section 216(e), 49 U.S.C. § 316(e) 3,5,6,11, 12,13

Section 217(a), 49 U.S.C. § 317(a) 5

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UNITED STATES OF AMERICA, and
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-styled case on July 21, 1977, and affirmed on rehearing on November 22, 1977.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals, together with the dissent of Judge Widener, appears in Appendix A hereto and is reported at 559 F. 2d 1251. The *per curiam* order of the Court of Appeals on rehearing affirming its earlier judgment and incorporating the dissenting opinion of Judge Widener appears in Appendix B hereto and is reported at 565 F. 2d 290. The Report and Order of the Interstate Commerce Commission in Ex Parte No. 297, *Rate Bureau Investigation* which the Court of Appeals upheld, appears in Appendix C hereto and is reported at 349 I.C.C. 811. The Report and Order of the Commission denying numerous petitions for reconsideration, including one filed by Petitioners' agent Middle Atlantic Conference, appears in Appendix D hereto, and is reported at 351 I.C.C. 437.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1977. The judgment was affirmed on rehearing by order entered November 22, 1977. This Court has jurisdiction under Section 2350(a) of Title 28 of the United States Code.

QUESTIONS PRESENTED

Section 5a of the Interstate Commerce Act, 49 U.S.C. §5b, authorizes the Interstate Commerce Commission to approve agreements among motor common carriers under which they collectively establish their rates. The effect of approval is to exempt such collective ratemaking from the operation of the antitrust laws. The questions presented are:

1. Did the ICC abridge rights guaranteed by the First Amendment when it adopted a general rule prohibiting organizations of carriers engaged in collective ratemaking from making complaints to it challenging the lawfulness of rates independently filed with the ICC by a member of the organization?

2. Did the Court of Appeals erroneously interpret the decision of this Court in *California Motor Transport* v. *Trucking Unlimited,* 404 U.S. 508 (1972), in holding that groups of carriers can be prohibited from making complaints to the ICC challenging the lawfulness of independently filed rates notwithstanding the absence of a showing that such action is for the purpose or has the effect of barring individual carriers from independently filing rates with the ICC?

3. Does the ICC's rule prohibiting organizations of carriers engaged in collective ratemaking from making complaints to it challenging the lawfulness of rates exceed its authority under Section 5a of the Interstate Commerce Act, violate Section 216(e) thereof and contravene the National Transportation Policy?

STATUTORY PROVISIONS

The relevant Constitutional and statutory provisions are cited below and are set forth in material part in Appendix E hereto. Those provisions are:

1. The First Amendment of the United States Constitution.

2. The Interstate Commerce Act:

National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001. Section 5a, 49 U.S.C. § 5b. Section 216(e), 49 U.S.C. § 316(e), first sentence.

STATEMENT OF THE CASE

In Ex Parte No. 297, *Rate Bureau Investigation*, the ICC undertook to review the operations of so-called rate bureaus, *i.e.* organizations of common carriers engaged in the collective making of transportation rates under agreements approved by it. Upon consideration of numerous written statements of fact, opinion, comment and argument from Federal and State governmental agencies, associations of shippers, associations of carriers and individual shippers and carriers, the ICC issued its report and order on June 16, 1975. (Appendix C). Upon petitions for reconsideration and replies thereto the ICC affirmed and clarified the report and order by a second report and order issued January 30, 1976. (Appendix D). The portion of the order here challenged reads as follows:

> "*It is further ordered,* That rate bureaus be, and they are hereby, prohibited from protesting proposals of member carriers."

Petitioners are motor common carriers of property operating in interstate and foreign commerce pursuant to certificates of public convenience and necessity issued by the ICC. They are members of Middle Atlantic Conference, which is a nonprofit membership corporation organized under the laws of the District of Columbia. Its members are motor common carriers of property operating in interstate and foreign commerce within Middle Atlantic Territory, between that Territory and New England Territory, and between those Territories on the one hand and Quebec and the Maritime Provinces of Canada on the other.[1]

Middle Atlantic's charter and by-laws give it authority to perform, and it has been continuously performing since its creation in 1936, three basic functions for its members. First, it provides the means by which the members implement the agreement approved by the ICC under which they collectively discharge their duty under Sections 216(b) and (d) of the Act, 49 U.S.C. §§ 316(b) and (d), to establish and maintain just, reasonable and otherwise lawful rates. Second, as the members' agent, it discharges their duty under Section 217(a) of the Act, 49 U.S.C. § 317(a), to publish and file rates with the ICC. Third, it institutes and participates in administrative and judicial proceedings to protect the common interests of the membership at large in rate and tariff matters. See *Middle Atlantic Conference, Agreement,* 283 I.C.C. 683 (1951). It is the performance of the third function by way of making complaints to the ICC challenging the lawfulness of rates filed by an individual member independently of its fellow members that the ICC's order here challenged forbids.

On March 30, 1976 Petitioners filed a petition for review of the ICC's order in the United States Court of Appeals for the District of Columbia Circuit. Thereupon the proceeding was transferred to the United States Court of Appeals for the Fourth Circuit for consolidation with two other cases challenging other portions of the ICC's order in Ex Parte No. 297. Petitioners' argument to the Court of Appeals ran as follows:

Petitioners have a Constitutional right to band together to seek governmental action, including action by the ICC, which they conceive to be in their common interests. The Congress recognized and confirmed this right in Section 216(e) of the Act, 49 U.S.C. § 316(e) which provides that *any* person or organization may make complaint to the ICC that the rates of *any* carrier, either in effect or proposed to be put into effect, are unlawful. Section 5a of the Act, 49 U.S.C. § 5b, authorizes the ICC to approve and thereby immunize from the antitrust laws the carrying out of agreements under which motor carriers collectively make rates. Section 5a specifically provides that no action of the ICC thereunder shall have any effect other than to relieve parties to an approved agreement from the operation of the antitrust laws. The ICC cannot condition its approval of such agreements upon the carriers' surrender of their Constitutional and statutory right to make complaints to it through a rate bureau.

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[1] Middle Atlantic Territory comprises the States of Delaware, Maryland, New Jersey, New York, Pennsylvania, Virginia, West Virginia and the District of Columbia. New England Territory comprises the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. The Maritime Provinces of Canada comprise Newfoundland, New Brunswick, Nova Scotia and Prince Edward Island.

On July 21, 1977, the Court of Appeals, in a brief opinion by the late Justice Tom Clark, affirmed the ICC's order. The Court did not deal with Petitioners' Constitutional claim at all. Noting that Petitioners claimed a right under the First Amendment and Section 216 (e) of the Act to make complaints to the ICC, the Court said:

> "... Section 216(e) of the Act, 49 U.S.C. § 317(e), does provide that 'Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this Section or of Section 217 (49 U.S.C. § 317) ...' It may be that under Section 216 or 217 individual protests may be filed but, strangely enough, only Section 5a deals with 'agreements concerning rates and related matters,' and it requires prior approval of the Commission in order for the parties to the agreements to escape the penalties of the antitrust laws. To permit a rate bureau to protest the proposals of a member individually so chills the individual proposal that it stands little chance of adoption, while providing the opportunity for misuse of the bureaus as policing agencies against individual action. We agree with the Commission that 'it is necessary to limit the bureaus' right to protest in order to foster independent action. The right of independent action is paramount to maintaining the integrity of the grant of antitrust immunity.' The interpretation pressed by the petitioners would operate to repeal Section 5a, the very heart of the Act, leaving the bureaus without statutory authorization as well as antitrust immunity."

Judge Widener dissented on the ground that Section 216(e) of the Act grants rate bureaus a right to make complaint to the ICC which is not in conflict with, or limited by, the right of a member of a rate bureau to file rates independently of its fellow members. Judge Widener concluded his dissent as follows:

> "Because I rely on the statutory provisions, I find no need to discuss, and express no opinion on, the first amendment issues raised in this appeal and somewhat persuasively presented under the *Noerr-Pennington* doctrine. *Ashwander* v. *T.V.A.*, 297 U.S. 288, 346, (1935) (Brandeis, J., concurring). See *Eastern R. R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972)."

Petitioners sought rehearing on the ground, *inter alia*, that the Court had failed to deal at all with the Constitutional issue raised. In a *per curiam* decision on rehearing Judge Butzner and Judge Hall affirmed the ICC's order for the reasons stated by the late Justice Clark, adding the following:

> "[T]he commission's order did not violate the carriers' first amendment rights. The order is a proper exercise of the power that the commerce clause confers on Congress and the commission to prohibit anticompetitive conduct. *Cf.* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

Judge Widener dissented for the reasons he had stated earlier.

REASONS WHY WRIT SHOULD BE GRANTED

The Constitutional Issue is Substantial

Petitioners have the Constitutional right to band together to seek governmental action which they conceive to be in their common economic interest. *Eastern Railroads Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127 (1961). Petitioners' right to jointly seek governmental action includes the right to seek administrative and judicial action. *California Motor Transport* v. *Trucking Unlimited,* 404 U.S. 508 (1972). Petitioners may exercise their right through a spokesman of their own choice. *NAACP* v. *Button,* 371 U.S. 415 (1963); *Brotherhood of Trainmen* v. *Virginia,* 377 U.S. 1 (1964). The order of the ICC here challenged clearly deprives Petitioners of their right to make complaints to it through their chosen spokesman, their rate bureau, that rates of motor carriers filed independently are unlawful under the regulatory standards of the National Transportation Policy and the Interstate Commerce Act.

In support of the order the ICC and the Court of Appeals relied on Section 5a(2) of the Interstate Commerce Act. That Section authorizes the ICC to approve agreements for collective ratemaking "upon such terms and conditions" as it finds necessary to assure that collective ratemaking under a particular agreement is in furtherance of the National Transportation Policy. The theory is that the ICC's authority to impose terms and conditions governing the process of collective ratemaking permits it to require carriers to surrender their right to make complaints through rate bureaus as the price for permission to engage in collective ratemaking. This proposition flies in the face of the settled rule that the Government cannot make an activity dependent upon a permit and then make an otherwise unconstitutional requirement a condition to the grant of the permit. This Court has had occasion to apply this rule in two recent cases. In *Bates* v. *State Bar of Arizona,* ___ U.S. ___, 53 L. Ed. 2d 810 (1977), it held that the First Amendment gives lawyers the right to advertise and that a State's authority to license them and regulate their practices is not the authority to deprive them of that right. *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748 (1976), held that a State could not ban the advertising of prescription drugs as the *quid pro quo* for a license as a pharmacist.

While these cases recognize that the Government may regulate commercial speech, they make clear that a complete prohibition of such speech is not permissible. On the contrary, as in the case of any governmental action that trenches on rights under the First Amendment, the regulation of commercial speech must be carefully drawn to deal with abuses of the right that would be detrimental to the public. In contrast, what the Court of Appeals has approved here is a complete prohibition of the making of complaints by bureaus on the ground that such complaints may tend to discourage carriers from independently filing rates, and that the exercise of the right might be abused.[2] We submit that a complete ban on such complaints can no more be justified by such fears than a complete ban on advertising by lawyers was justified by the kind of speculation as to dire consequences urged on this Court in *Bates.* See 53 L. Ed. 2d at 826-832. Certainly, the imposition of such a complete ban raises a substantial issue under the First Amendment.

The Decision of the Court of Appeals Conflicts with the Decisions of this Court

On rehearing the Court of Appeals, citing *California Transport,* held that the ICC's order "is a proper exercise of the power that the commerce clause confers on Congress and the commission to prohibit anticompetitive conduct." We submit that this holding clearly conflicts with the decisions of this Court in *Noerr, supra* and *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965). Those cases specifically hold that the First Amendment gives persons the right to jointly seek to influence public officials regardless of intent or purpose. "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Pennington, supra,* 381 U.S. at 670.

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[2] As Judge Widener pointed out in his dissent, the ICC found that the bureaus did not abuse the right to make complaints and there was no evidence that their doing so discouraged carriers from filing rates independently.

California Transport did not overrule *Noerr* and *Pennington.* On the contrary, it reaffirmed those cases and specifically extended protection under the First Amendment to joint efforts to influence administrative agencies and courts. All *California Transport* does is distinguish between genuine efforts to influence Government action, which are permissible whatever their purpose and effect, and efforts to bar competitors from meaningful access to Government bodies, which are impermissible if in furtherance of a conspiracy to violate the antitrust laws.

In *Franchise Realty, Etc.* v. *S. F. Loc. Joint Exec. Bd.*, 542 F. 2d 1076 (9th Cir. 1976), *cert. den.* 430 U.S. 940 (1977), the Ninth Circuit granted a motion, grounded on *Noerr-Pennington* to dismiss a suit under the antitrust laws. Dealing with the "sham exception" to *Noerr,* the Court held that it cannot be invoked absent allegations that the legislative, administrative or judicial processes had been abused in specific ways for the purpose of harassing competitors and deterring them from free access to Government agencies. In contrast, what the Fourth Circuit held here is that the ICC, which has no jurisdiction to enforce the antitrust laws, can adopt a general rule forbidding rate bureaus to invoke its administrative processes on the ground that there might at sometime in the future be an abuse of those processes which would ground a suit under the "sham exception" to *Noerr.* Certainly this holding merits plenary review by this Court.

The ICC's Order Violates The Congressional Regulatory Scheme

The National Transportation Policy makes it the duty of the ICC to administer the Interstate Commerce Act so as "to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices." This is a tremendously difficult task that the ICC cannot perform alone. As Judge Widener pointed out, the ICC has long recognized that it " is manifestly

impossible, as a practical matter, for the Commission to scrutinize each and all of the multiplicity of tariffs and rate changes that are constantly being filed."[3] The Congress, too, was aware that the ICC could effectively perform its regulatory functions only with the help of those who, acting as "private attorneys general", call its attention to rates and other tariff provisions that appear to be unlawful. It therefore provided in Section 216(e) of the Act that any person or organization may make complaint to the ICC against any rate or tariff provision.[4]

As Judge Widener pointed out the ICC harmonized Section 216(e) with Section 5a so as to give full effect to both in the following way:

> "The right to take independent action by conference members is distinguished from, and does not conflict with, the equally established right of the conference, or any other person or body politic to protest or complain of any such action. After a carrier takes independent action, the action taken stands upon exactly the same footing with respect to the conference, in its efforts to foster a sound and stable rate structure in the interest of its members as a whole, as any such action taken by a carrier not a conference member. To interpret section 5a otherwise would not only contravene the provisions of section 216, paragraphs (e) and (g), as stated, and of the national transportation policy, but would jeopardize the full and free hearing so necessary and essential to the development of complete records before the Commission. For the foregoing reasons, we are not in accord with the protestants in their request that the

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[3] The ICC's Annual Report to the Congress for 1976, pp. 120, 143, says that 220,000 motor carrier tariffs were filed with it in that fiscal year.

[4] The ICC's Annual Report for 1976, p. 63, notes that in that fiscal year it examined 1,958 tariffs against which complaints were filed, but only 283 on its own motion.

> agreement be modified to prohibit the conference from petitioning for the suspension of member-carrier rates or participating in complaint proceedings before the Commission."

The ICC now says that the carriers' right under Section 216(e) to make complaint through their rate bureaus is in conflict with and must be subordinated to the right of carriers to file rates independently. It therefore adopted a rule forbidding rate bureaus from exercising the unqualified and unconditional right Section 216(e) plainly gives them. In upholding the ICC's action the Court of Appeals said:

> "It may be that under Section 216 or 217 individual protests may be filed but, strangely enough, only Section 5a deals with 'agreements concerning rates and related matters' and it requires prior approval of the Commission in order for the parties to the agreements to escape the penalties of the antitrust laws."

This statement reflects a clear misapprehension of the law. In the first place, Section 216(e) specifically provides for protests by "any . . . organization" and draws no distinction between organizations of carriers and organizations of others. In the second place, the Court of Appeals is saying that organizations of carriers cannot exercise the right confirmed to them by Section 216(e) unless they first obtain the approval of the ICC under Section 5a. This is plainly not the law. The only authority Section 5a gives the ICC is the authority to approve agreements relating to the "joint consideration, initiation or establishment" of rates and charges, *i.e.*, agreements between carriers to collectively make their rates. *Western Traffic Association Agreement*, 276 I.C.C. 183, 212 (1949). Furthermore, Section 5a provides that the only effect of the approval of an agreement to collectively make rates is to immunize the collective ratemaking from the antitrust laws.

In short, Section 5a gives the ICC no authority either to approve or to disapprove agreements among carriers relating to the making of complaints under Section 216(e), or to immunize such activity from the antitrust laws.

As *Noerr* holds, the First Amendment grants the right to make and carry out agreements for joint complaints to Governmental agencies and immunizes the making of such joint complaints from the antitrust laws.

Having erroneously held that the ICC can approve or disapprove agreements among carriers to file complaints, the Court of Appeals went on to hold that the ICC's disapproval was justified in this case. It said:

> ". . . To permit a rate bureau to protest the proposals of a member individually so chills the individual proposal that it stands little chance of adoption, while providing the opportunity for misuse of the bureaus as policing agencies against individual action."

There is no support for this proposition in the record or in the findings of the ICC. On the contrary, as Judge Widener pointed out, the ICC found that carriers have not abused their right to protest through rate bureaus and that the practices of the bureaus in filing protests have been fair.

As for the statement that complaints "chill" rate proposals, it misapprehends the process. A complaint, whether by Petitioners through a rate bureau or by anyone else, merely asks the Commission to investigate the lawfulness of rates. If it is supported by data indicating that the rates are unlawful under the regulatory standards of the Interstate Commerce Act, the rates should be and will be set for investigation. If this process constitutes a "chilling" of rate proposals it is precisely the "chilling" that Section 216(e) of the Act provides for. Hence, there is no conflict between a carrier's right to file a rate and the right of others to complain against it. It follows that the conclusion of the Court of Appeals that to permit carriers to make complaints through rate bureaus would be to "repeal Section 5a" is plainly erroneous.

PRAYER

Petitioners submit that the foregoing establishes the presence of "special and important" reasons for granting this petition.

Wherefore, Petitioners pray the Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review its decision in this case.

Respectfully submitted,

OF COUNSEL:	BRYCE REA, JR. DAVID H. COBURN 918—16th Street, N.W. Washington, D.C. 20006 (202) 785-3700 *Counsel for Petitioners*
REA, CROSS & AUCHINCLOSS 700 World Center Building 918—16th Street, N.W. Washington, D. C. 20006	

February 21, 1978

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1329

MOTOR CARRIERS TRAFFIC ASSOCIATION, INC., *Petitioner*

v.

THE UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION, *Respondents*

and

DRUG & TOILET PREPARATION TRAFFIC CONFERENCE, EASTERN INDUSTRIAL TRAFFIC LEAGUE, NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, NATIONAL INDUSTRIAL TRAFFIC LEAGUE,
Intervening Respondents

No. 76-1425

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., *Petitioners*

v.

THE UNITED STATES OF AMERICA AND THE
INTERSTATE COMMERCE COMMISSION, *Respondents*

and

DRUG & TOILET PREPARATION TRAFFIC CONFERENCE, EASTERN INDUSTRIAL TRAFFIC LEAGUE, NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, NATIONAL INDUSTRIAL TRAFFIC LEAGUE,
Intervening Respondents

and

BULK CARRIER CONFERENCE, INC., *Intervening Respondent*

No. 76-1426

All Island Delivery Service, Inc., Feuer Transportation, Inc., John A. Jungerman Son, Inc., Pinter Bros., Inc., Troiano Express Co., Inc., *Petitioners*

v.

The United States of America and the Interstate Commerce Commission, *Respondents*

and

Drug & Toilet Preparation Traffic Conference, Eastern Industrial Traffic League, National Small Shipments Traffic Conference, National Industrial Traffic League, *Intervening Respondents*

in Nos. 76-1329, 76-1425 and 76-1426

On Petition for Review of Orders of the Interstate Commerce Commission

Submitted December 7, 1976 Decided July 21, 1977

Before Clark, Associate Justice *, Butzner and Widener, Circuit Judges.

(J. Raymond Clark, 600 New Hampshire Avenue, N.W., Washington, D.C. and A. W. Flynn, Jr., York, Boyd & Flynn, Greensboro, North Carolina, for Petitioner in No. 76-1329; Bryce Rea, Jr., 918 - 16th Street, N.W., Washington, D.C., Counsel for Petitioners in No. 76-1426).

(Donald I. Baker, Assistant Attorney General, Lloyd John Osborn, Department of Justice, Washington, D.C., Attorneys for the United States of America, Respondent; Robert S. Burk, Acting General Counsel, and Hanford O'Hara, Associate General Counsel, Interstate Commerce Commission, Washington, D.C., Attorneys for the Interstate Commerce Commission, Respondents in Nos. 76-1329, 76-1425 and 76-1426).

(John F. Donelan, John M. Cleary and Frederic L. Wood, 914 Washington Building, Washington, D.C., Attorneys for the National Industrial Traffic League, Intervening Respondent in Nos. 76-1329, 76-1425 and 76-1426).

(Daniel J. Sweeney of Belnap, McCarthy, Spencer, Sweeney & Harkaway, 1750 Pennsylvania Avenue, N.W., Washington, D.C., Attorney for Intervenor, Drug and Toilet Preparation Traffic Conference, Eastern Industrial Traffic League and National Small Shipments Traffic Conference, in Nos. 76-1329, 76-1425 and 76-1426).

(William E. Kenworthy, P.O. Box 5746, T. A., Denver, Colorado, and Bryce Rea, Jr., 918 Sixteenth Street, N.W., Washington, for Petitioner Rocky Mountain Motor Traffic Bureau, Inc. in No. 76-1425; Leonard A. Jaskiewicz and Edward J. Kiley, 1730 M Street, N.W., Washington, D.C., Attorneys for Intervenor Bulk Carrier Conference, Inc. in No. 76-1425).

Mr. Justice Clark:

These three consolidated appeals from the Interstate Commerce Commission seek to set aside, in part, Orders that were entered by the Commission in Ex Parte No. 297, *Rate Bureau Investigation,* which was a broad scale study of the regulated transportation industry's various collective ratemaking organizations, known as "rate bureaus".

The history of collective rate-making efforts by surface transportation carriers in the United States is both long and controversial. See: *United States* v. *Trans-Missouri*

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* Tom C. Clark, Associate Justice of the United States Supreme Court (Ret.), sitting by designation.

Freight Assn., 166 U.S. 290 (1897); *United States* v. *Joint Traffic Association*, 171 U.S. 505 (1898); *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945); *Western Traffic Assn. —Agreement*, 276 I.C.C. 183 (1949). The Congressional action took the form of the Reed-Bulwinkle Act of 1948, 62 Stat. 472, Section 5a of the Interstate Commerce Act (49 U.S.C. § 5b). Congress decided that the problem was one of reconciling the demands of the Nation's transportation system with the policies of the antitrust laws. This Act left "the antitrust laws with full force and effect to carriers . . . except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body upon a finding that, by reason of furtherance of the national transportation policy as declared in the Interstate Commerce Act, relief from the antitrust laws should be granted." H. R. Rep. No. 1100, 80th Cong., 1st Sess., at 5. Surface carriers that are parties to agreements concerning rates and related matters can submit such agreements to the Commission for approval and, if approved, the parties to the agreements are relieved from the operation of the antitrust laws with regard to the same. 49 U.S.C. § 5b(2). The Act mandates the Commission to approve the agreement only if it finds that the agreement is in furtherance of the national transportation policy and is not prohibited by 49 U.S.C. §§ 5b(4), (5), and (6).[1] The Commission, in carrying out this directive of Congress is the creator of the rate bureau since without immunity from the antitrust laws, it cannot operate. Indeed, the Act requires that rate bureaus operating under approved agreements must maintain and keep open for inspection accounts and records and to file such reports as the Commission requires. 49 U.S.C. § 5b(3). The Commission is also given authority to investigate and determine whether any previously approved agreement, or any terms or conditions upon which the approval was granted, are in conformity with the standards of 49 U.S.C. § 5b(2), and further, the Commission is given the power to terminate or modify its prior approval in order to insure compliance with the standards of the Act. 49 U.S.C. § 5b(7).

Pursuant to 49 U.S.C. § 5b, the Commission has from time to time approved rate bureau agreements. See, e.g., *Western Traffic Assn.—Agreement, supra; Rocky Mountain Carriers—Agreement*, 302 I.C.C. 569 (1958); *Motor Carriers Traffic Assn., Inc.—Agreement*, 301 I.C.C. 781 (1957); *Eastern Tank Carriers—Agreement*, 301 I.C.C. 359 (1957); *Middle Atlantic Conference—Agreement*, 283 I.C.C. 683 (1951).

It was to review its approval of such prior Agreements that Ex Parte No. 297 was instituted in 1973, posing twenty-eight areas of inquiry, as specifically authorized by 49 U.S.C. § 5b(7). Numerous parties indicated an intention to participate in the proceedings; consequently, by Order dated November 15, 1973, the Commission directed the Bureau of Enforcement "to file and serve a statement of verified facts and of argument setting forth the matters developed in the field investigations, as well as from other sources, regarding the conduct of the carrier rate bureau as a catalyst for the subsequent submission of initial statements of facts, arguments and opinion by the respondents and other interested parties." *First Report*, 349 I.C.C. at 816. Several hundred initial and reply statements were filed in response. The Orders of the Commission arising out of this survey directed that the agreements of rate bureaus would not thereafter be accorded antitrust immunity under 49 U.S.C. § 5b; (1)

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[1] 49 U.S.C. §§ 5b(4), (5), and (6) prohibit approval of agreements which:

(1) are among carriers of different specified classes and are not limited to matters relating to transportation under joint rates or over through routes;

(2) which involve "pooling" under § 5(1) of the Act (49 U.S.C. § 5(1)); or

(3) which do not accord to each party the "free and unrestrained right to take independent action either before or after any determination arrived at through such procedure."

if such bureaus protest the independent action proposals of any of their member carriers; (2) if such carrier members are affiliated with shippers, unless the agreements of the bureau prohibit such carriers from serving on the bureau's Board of Directors, general rate committees or any other committees which have an effect directly or indirectly upon the rate-making function of the bureau, without prior Commission approval; and, finally, (3) if the bureaus involved are operating as profit-making entities.

The petitioners include Motor Carrier Traffic Association, Inc. (MCTA), a motor carrier rate bureau operating for profit, which challenges the withdrawal of antitrust immunity from bureaus which operate for profit; Rocky Mountain Motor Traffic Bureau, Inc. (Rocky Mount), a motor carrier rate bureau challenging the restrictions on carrier members of bureau affiliated with shippers; and All Island Delivery Service, Inc., Pinter Bros., Inc., Troiano Express Co., Inc., Feuer Transportation, Inc., and John A. Jungerman Son, Inc., individual carrier members of the Middle Atlantic Conference, a rate bureau, challenging the provisions of Ex Parte 297 which withdraw antitrust immunity from rate bureaus protesting independent action proposals of member carriers before the Commission. Additionally, several organizations interested in the outcome have intervened. Respondents are the Interstate Commerce Commission and the United States (statutory respondent under 28 U.S.C. § 2344). This court's jurisdiction to review lies under 28 U.S.C. §§ 2321 and 2341 *et seq.*

The questions raised by the petitioners range from First Amendment rights to a charge of "arbitrary and capricious conduct" on the part of the Commission. None of the claims are meritorious, as we will briefly show below. In so finding, we uphold the Orders of the Commission.

1. At the outset we note that Section 5a(2) of the Act (49 U.S.C. § 5b(2)) authorizes the Commission to approve an agreement made under the provisions of the Section "if it finds that, by reason of the furtherance of the national transportation policy declared in this Act, the relief provided in Paragraph (9) . . . should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied." The Commission followed this procedure and, in approving the applications, provided that they were subject to "such general terms and conditions as the Commission may prescribe". In addition we note that Section 5a(7) of the Act (49 U.S.C. § 5b(7)) specifically authorizes the Commission "to investigate and determine whether any agreement previously approved by it under this section . . . is not or are not in conformity with the standards set forth in paragraph [5a(2), 49 U.S.C. § 5b(2)]"—in "furtherance of the national transportation policy." In addition, Section 5a(7) provides:

> ". . . after such investigation the Commission shall by order terminate or modify its approval of such an agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standard . . ."

Despite these clear and unequivocal words, petitioners say that under the First Amendment and Section 216 of the Act, 49 U.S.C. § 317, the rate bureaus have a constitutional right to file such protests. Section 216(e) of the Act, 49 U.S.C. § 317(e), does provide that "Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this Section or of Section 217 (49 U.S.C. § 317) . . ." It may be that under Section 216 or 217 individual protests may be filed but, strangely enough, only Section 5a deals with "agreements concerning rates and related matters", and it requires prior approval of the Commission in order for the parties to the agreements to escape the penalties of the antitrust laws. To permit a rate bureau to protest the proposals of a member individually so chills the individual proposal that it stands little change of adoption, while providing the opportunity for misuse of the bureaus as the policing agencies against individual action. We agree with the Commission that "it is necessary to limit the bureaus' right to protest in order to foster independent action. The right of independent action is paramount to maintaining the integrity of the grant of antitrust immunity." The interpretation pressed by the petitioners would operate to repeal Section 5a, the very heart of the Act, leaving the bureaus without statutory authorization as well as antitrust immunity.

Petitioners urge that the Commission cannot reverse itself and now impose restrictions on the bureaus and that such action is arbitrary and capricious. The short answer is, of course, that reversal of views is no anomaly in democratic societies. In fact, it is the principal tool by which improvement is effected. The Supreme Court itself not only engages in the practice but has approved of its use by the Commission. See: *American Trucking Assns., Inc.* v. *Atchison T. & S.F. Ry. Co.,* 387 U.S. 397, 416 (1967). Further, there is nothing irrational about the new rule that the Commission intends to put into effect. In fact, the new rule is in the true tradition of our free enterprise system which has been the keystone of our economic accomplishment for nearly a century. The Commission, in so acting, exercises its legislative function, and, as the Fifth Circuit has said: "may look beyond [the record] and draw upon its own expertise and experience." *General Telephone Co.* v. *United States,* 449 F. 2d 846, 862 (1971). Based upon its experience, the Commission found that, as usual, more goes on than meets the eye. The paucity of formal bureau protests does not adequately reflect the number of threatened protests, nor has the mere existence of the right to protest had a significant anti-competitive impact, both Commission findings. Certainly the purpose of the Commission was to stimulate competition by removing the inhibitions against the filing of independent actions, a move not only in the spirit of Section 5a of the Act but in furtherance of the national transportation policy which is the essence of this case.

2. We now reach the challenge to the order prohibiting carriers that are in any way affiliated with a shipper from serving on a bureau's board of directors, general rate committee or any other committee which has an effect, either directly or indirectly, upon the rate-making function of the bureau, without specific prior Commission approval. It is said that this requirement is beyond the Commission's statutory authority and is also arbitrary and capricious. As we have already indicated, Section 5a (7) of the Act, 49 U.S.C. § 5b(7), grants the Commission full and complete authority to act as it did, and we shall not discuss the point further. See: *United States* v. *Chesapeake & Ohio Ry. Co.,* 44 LW 4869-4878 (decided June 17, 1976); *United States* v. *Allegheny-Ludlum Steel,* 406 U. S. 742, 755 (1972). Nor does the Commission's Order violate a legislative policy favoring rate bureau organizations. The Order does not destroy the basic purpose of the bureaus, contrary to the bureaus' claim, as the restrictions are not absolute—the Order itself permits exceptions. Moreover, we note that the Congress directed that the Commission should weigh the conflicting demands of the antitrust laws and the surface transportation system, resolving the same by the application of a standard involving the National Transportation Policy. H. R. Rep. No. 1100, 80th Cong. 1st Sess. at 5. Such a resolution requires consideration, not only of efficiency but of competitive impact. See: *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87 (1944).

Nor do we believe that the action of the Commission in this regard lacked a rational basis. Our study of the problem shows that the possibility of a conflict of interest is self-evident, although none was actually shown. In such a state of the record, it appears rational for the Commission to prohibit shipper-affiliated carrier participation in those activities where the possibility of a conflict of interest is high, but to permit exemptions through Commission approval of bureau applications. The Commission adopted a stance which in effect, is a case by case disposition, rather than a general rule. We find that this procedure overcomes the petitioners' objection.

The remaining contentions regarding this rule are frivolous and require no discussion.

3. The final issue presented is the question of rate bureau profit-making activities. It is contended that prohibiting profit-making is beyond the power of the Commission and that the action involved here should be classified as adjudication, rather than rule-making. As we have indicated, *supra*, we consider the action of the Commission in Ex Parte 297 to constitute rule making—and, we add, all of the petitioners, save one, agree. Under the Administrative Procedure Act " 'rule', means the whole or part of an agency statement of general or particular applicability and future effect, designed to implement, interpret or prescribe law or policy . . ." 5 U. S. C. 551 (4). Petitioner points to no applicable provision of law which requires a full dress hearing here, nor have we found any.

The petitioner finally claims that the Commission has no power to prohibit profit-making and to do so is an unconstitutional deprivation of property, but does not support this view with authority. In fact, to the contrary, the Commission found the rate bureaus to be service organizations "financed by fee assessments of the members, and not entrepreneurial. As such, the element of profit has been attacked as not compatible with

the strict service function of organizations operating with antitrust immunity. *First Report,* 349 I.C.C., at 826. The bureaus act as agents for the carriers and would be in violation of the antitrust laws without the immunity bath furnished by the Commission. All of the expenses of the bureaus are passed on to the shippers and ultimately to the public. If there are services to the public, reimbursement should be on a compensatory basis. The cost of the bureaus as profit-making organizations chargeable to the shipper and the public is inconsistent with the public interest. If this drives the bureaus out of business, so be it. The public will not be saddled with their profits and at the same time afford them antitrust immunity. The orders of the Commission are Affirmed.

Widener, Circuit Judge, concurring and dissenting:

I concur in the opinion of the court in Nos. 76-1329 and 76-1425. But, in No. 76-1426, I respectfully dissent.

In deciding to prohibit rate bureaus from protesting independent action proposals of member carriers, the Interstate Commerce Commission quotes language from *Arbet Truck Lines, Inc.* v. *Central States Motor Freight,* 321 I.C.C. 460, 471, stating that "[i]t is necessary to harmonize Section 5a [49 U.S.C. § 5b] and Sections 216(e) and (g) [49 U.S.C. §§ 316(e) and (g)] of the Act."

49 U.S.C. § 5b relieves parties to an approved agreement (rate bureaus) from the operation of the antitrust laws. 49 U.S.C. § 316(e) provides in pertinent part:

> "Any person, State board, organization, or body politic may make complaint in writing to the Commission that any such rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 317 of this title."

For a number of years the ICC has given effect to both parts of the statute as enacted by Congress. *Central States Motor Common Carriers—Agreement,* 299 I.C.C. 773 (1957); *Southern Motor Carriers—Agreement,* 297 I.C.C. 603 (1956); *Middle Atlantic Conference—Agreement,* 283 I.C.C. 683, 689 (1951).

In *Southern Motor Carriers,* the ICC harmonized the two sections in the following way:

> 'The right to take independent action by conference members is distinguished from, and does not conflict with, the equally established right of the conference, or any other person or body politic to protest or complain of any such action. After a carrier takes independent action, the action taken stands upon exactly the same footing with respect to the conference, in its efforts to foster a sound and stable rate structure in the interest of its members as a whole, as any such action taken by a carrier not a conference member. To interpret section 5a otherwise would not only contravene the provisions of section 216, paragraphs (e) and (g), as stated, and of the national transportation policy, but would jeopardize the full and free hearing so necessary and essential to the development of complete records before the Commission. For the foregoing reasons, we are not in accord with the protestants in their request that the agreement be modified to prohibit the conference from petitioning for the suspension of member-carrier rates or participating in complaint proceedings before the Commission." 297 I.C.C. at 616.

But now, in spite of its findings that "the practice of rate bureaus in protesting rates has been conducted in a manner that is generally fair and devoid of base motives," and in spite of its statement that "[w]e have not found evidence of any flagrant abuse by rate bureaus in the exercise of the right to protest," the ICC declares that the rate bureaus' right to protest must be "subordinated" to the right of independent action.

The statistical background, however, which in this case must speak with more authority than mere feelings, does not show a threat to independent action: indeed I submit the contrary is shown. Of the 7,468 independent actions in 1973, the seven bureaus protested 199, only 2.66 percent. Middle Atlantic, for example, protested 46 of 1,064 independent actions in its tariffs in the twelve months ending May 31, 1973. Thirty-four of the 46 protested tariffs were rejected, suspended, or withdrawn. In 1973, Rocky Mountain Tariff Bureau protested 6 of 320 independent actions in its tariffs. Four of the six protested tariffs were suspended or withdrawn. Southern Motor Carriers Rate Conference protested 26 of the 2,914 independent actions in its tariffs. Thirteen of the 26 protested tariffs were suspended. The low percentage of bureau protests and the high percentage of their success indicate to me that the system is working as Congress intended, that is, as an "advantage and aid to the Commission in the administration of the act and the prevention of destructive rate cutting" in a situation where "[i]t is manifestly impossible, as a practical matter, for the Commission to scrutinize each and all of the multiplicity of tariffs and rate changes that are constantly being filed." *Middle Atlantic Conference,* 283 I.C.C. at 689.

For these reasons, I would preserve the rate bureaus' right to protest as Congress established it in code §§316 (a) and (g).

Because I rely on the statutory provisions, I find no need to discuss, and express no opinion on, the first amendment issues raised in this appeal and somewhat persuasively presented under the *Noerr-Pennington* doctrine. *Ashwander* v. *T.V.A.,* 297 U.S. 288, 346 (1935) (Brandeis, J., concurring). See *Eastern R.R. Presidents*

Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1971).

APPENDIX B

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 76-1426

ALL ISLAND DELIVERY SERVICE, INC.,
FEUER TRANSPORTATION, INC.,
JOHN A. JUNGERMAN SON, INC.,
PINTER BROS., UNC.,
TROIANO EXPRESS INC.,

Petitioners,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,

Respondents.

DRUG AND TOILET PREPARATION TRAFFIC
CONFERENCE, EASTERN INDUSTRIAL TRAFFIC
LEAGUE, NATIONAL SMALL SHIPMENTS
TRAFFIC CONFERENCE, INC., NATIONAL
INDUSTRIAL TRAFFIC LEAGUE,

Intervenors.

ON PETITION FOR REVIEW OF AN ORDER OF THE INTERSTATE COMMERCE COMMISSION

Argued November 8, 1977 Decided November 22, 1977

Before BUTZNER, WIDENER, and HALL, Circuit Judges.

Bryce Rea, Jr. (Rea, Cross & Knebel on brief) for Petitioners; Henri Rush (Robert S. Burk, Acting General Counsel; Hanford O'Hara, Associate General Counsel, Interstate Commerce Commission; Donald I. Baker, Assistant Attorney General and Lloyd John Osborn, Attorney, Department of Justice on brief) for Respondents; Frederic L. Wood (John F. Donelan, John M. Cleary, Donelan and Cleary on brief) for Intervenor the National Industrial Traffic League; Charles J. McCarthy (Daniel J. Sweeney, Belnap, McCarthy, Spencer, Sweeney, and Harkaway on brief) for Intervenors Drug and Toilet Preparation Traffic Conference, Eastern Industrial Traffic League and National Small Shipments Traffic Conference.

PER CURIAM:

We granted the motor carriers' petition for rehearing to reconsider our decision upholding an order of the Interstate Commerce Commission in Ex Parte 297, *Rate Bureau Investigation* that withdrew anti-trust immunity from rate bureaus protesting independent action proposals of member carriers. Upon consideration of the briefs and oral argument, Judge Butzner and Judge Hall affirm the commission's order for the reasons stated by Mr. Justice Clark in the opinion that he wrote for the original panel of the court. Motor Carriers Traffic Association, Inc., v. United States, 559 F.2d 1251, 1254-55 (4th Cir. 1977).

Additionally, Judge Butzner and Judge Hall hold that the commission's order did not violate the carriers' first amendment rights. The order is a proper exercise of the power that the commerce clause confers on Congress and the commission to prohibit anticompetitive conduct. *Cf.* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

Judge Widener dissents for the reasons he previously stated. *See* Motor Carriers Traffic Association v. United States, *supra,* 559 F.2d at 1256-57.

APPENDIX C

Served June 16, 1975

30785

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 297

RATE BUREAU INVESTIGATION

Decided June 3, 1975

Investigation, upon the Commission's own motion, to inquire into the activities of ratemaking organizations operating pursuant to approved section 5a agreements to determine whether any of those agreements should be amended in any respect. Certain procedural and organization changes deemed necessary. Appropriate order entered and proceeding discontinued.

Leland J. Achorn, Anthony J. Adinolfi, H. C. Ahlberg Dennis G. Allman, Douglas Anderson, Richard L. Andrysiak, Stanley J. Auwers, William A. Ballantyne, J. G. Bamer, Robert K. Bauer, W. M. Beeler, C. R. Bennett, Richard Bens, John Bisognano, C. C. Boyd, Dennis J. Boyle, Michael J. Briody, Gary D. Bronson, David E. Brooks, Elwood J. Buckley, John R. Burgoyne, W. Dale Campbell, Lee G. Cardwell, Thomas B. Carr, Joseph F. Cassidy, Louis R. Cernjar, Charles Chilberg, George I. Clendaniel, Robert H. Cleveland, Henry W. Clements, Gerald A. Cole, Stephen A. Cole, W. J. Condon, John P. Corio, Aaron Cruise, R. N. Curley, C. O. Daugherty, H. Lynn Davis, Jack Dawson, Charles DeGeorge, John DiPasquale, R. A. Dombrowski, Edward J. Donohue, Forrest M. Durrett, Henry R. Edelberg, Harley E. England, Anthony J. Evangelisti, Ralph K. Fillingame, Benjy W. Fincher, R. E. Fitzgerald, Loy J. Foster, Arthur Frank, Philip T. Frye, Kenneth E. Gann, Lawrence G. Gordon, Max Gottfried, William F. Graf, Stanley J. Gutkowski, G. M. Handy, Robert W. Hagemann, Herbert K. Harder, Samuel L. Hash, Robert P. Heestand, G. G. Heller, Thomas M. Henry, Fred C. Hermann, Roy I. Hetland, John Himmer, James R. Holt, D. G. Hook, John H. Houston, Thomas M. Hummer, J. C. Hutcheson, Arthur E. Imperatore, Samuel B. Jamieson, Jr., Herbert J. Johnson, William J. Jones, George A. Juris, Edward W. Kelliher, Burton C. Kinney, Frank V. Klein, Robert R. Koltholf, William F. Lamperelli, E. N. Lawsoh, Carl M. Leslie, S. B. Lewandoski, Lauren H. Lewis, Arthur W. Lindsley, Wayland Little, Joseph A. Liveris, D. B. Lockridge, Richard G. Lougee, Red J.

Luecke, Harold R. McConnell, Joseph F. McCue, Robert McKee, J. D. Mahaffey, Matthew Mahon, Jr., Samuel Malkin, Frank E. Markiewicz, John J. C. Martin, Joseph Mega, Earl E. Meisenbach, J. Alex Michaud, Frank S. Mikulich, Vincent Nigrelli, H. E. Norin, B. T. O'Connor, Joseph H. O'Donnell, Howard J. O'Malley, Jr., Mike Palahunik, Neuman Paterson, H. L. Patterson, Oscar P. Peck, D. W. Penland, Andrew Perez, William Perrow, J. L. Pipes, W. M. Pries, Allan M. Ranson, J. A. Ripperger, Albert E. Roszell, John E. Russell, Albert P. Sagansky, George M. Sage, Chester J. Sams, H. Blaine Sanborn, Charles R. Sanderson, Paul Schuster, P. E. Seidler, Keith Y. Sharpe, Harold A. Shay, K. T. Sheehy, H. R. Shelley, Chester Sheluga, P. M. Shepherd, B. M. Shirley, Jr., James E. Singleton, J. F. Slater, William C. Sloan, Gerald W. Smith, W. D. Snavely, S. E. Somers, Jr., Eugene Spivak, D. Paul Stafford, Robert L. Stover, Robert M. Sullivan, C. H. Swanson, Edward J. Taylor, William P. Thompson, Delwyn J. Van Dyke, Keith Vaskelionis, Canio D. Verrastro, Warren K. Wahoske, R. C. Wallsmith, A. D. Weese, Gene T. West, E. N. Wickman, J. R. Young, George Zigich, and *Anthony C. Zisk* for individual motor carrier interests.

R. C. Bachelder, C. W. Bath, Ralph H. Bell, Martin W. Bercovici, Jacob P. Billig, Don A. Boyd, Michael M. Briley, Stanley W. Brown, Quentin L. Clark, William C. Collins, William H. Cramer, Frank M. Cushman, Harry W. Deck, Thomas D. Donis, T. A. Egner, Milton A. Evans, Fred G. Favor, Max E. Foster, H. E. Franklin, Jr., H. Richard George, John E. Harvey, John S. Hoff, R. S. Hubbard, James J. Irlandi, James M. Jones, Terrence D. Jones, William Q. Keenan, L. O. Kimberly, Ronald K. Kolins, Hamilton R. Large, Frank E. Larwood, Dickson R. Loos, C. G. Mathews, Frederic W. Mild, Paul V. Miller, L. B. Pim, James F. Rice, William R. Rubbert, Ernest Sigeti, J. V. Springrose, T. C. Stewart, Daniel J. Sweeney, Paul A. Thormann, Richard T. Tobey, Fred H. Tolan, Kenneth P. Tubbs, Paul P. Watkins, Archie T. Walters, Charles A. Washer, Edwin M. Wheeler, and *W. E. Williams* for shipping, manufacturing and trade interests.

Collier L. Allen, Alvin Altman, Michael J. Barnas, R. E. Born, James R. Boyd, Henry L. Brady, David Brodsky, Homer S. Carpenter, Drew L. Carraway, Don R. Devine, Eugene C. Ewald, John S. Fessenden, Carl H. Fritze, Robert G. Gawley, Carroll F. Genovese, Gerald W. Hess, William E. Kenworthy, F. H. Lynch, Jr., Herman Matthei, John W. McFadden, Jr., George D. Michalson, Norman Powell, Bryce Rea, Jr., S. Michael Richards, S. W. Taylor, Alan F. Wohlstetter, John Womack, and *Curtis L. Wood* for motor carrier rate bureaus.

Richard E. Altigilbers, Andrew C. Armstrong, Harry N. Babcock, Fred R. Birkholz, Charles W. Burkett, John T. Clark, Robert S. Davis, Kemper A. Dobbins, S. S. Eisen, Joseph D. Feeney, Louis A. Harris, Howard D. Koontz, Herman C. Kroll, Richard J. Murphy, Robert T. Opal, Duncan B. Phillips, Wesley A. Rogers, Albert B. Russ, Jr., James M. Souby, and *Donal L. Turkal* for rail, water and freight forwarder rate bureaus.

Edward A. Burkhardt, William F. Betts, O. W. Cobb, James I. Collier, Hollis G. Duensing, Melvin J. Florin, William M. Moloney, and *Thomas J. Siegel* for the American Association of Railroads and individual railroads.

Leonard A. Slater, Maurice J. Street, and *Harold S. Trimmer* for the General Services Administration.

Raymond W. Philipps and *James H. Phillips* for the United States Department of Justice, Antitrust Division.

James E. Armstrong for the Department of Defense.

William A. Bolger, Rodney E. Eyster, and *James C. Schultz* for the United States Department of Transportation.

Robert A. Blocki, John F. Donelan, John K. Maser III, William K. Smith, and *Paul J. Thomas* for the National Industrial Traffic League.

Peter J. Burns for the State of Illinois, Department of Business and Economic Development.

Thomas W. Dench for the Public Utility Commissioner of Oregon.

George H. Morin for the North Dakota Public Service Commission.

Bernard E. O'Gorman for the Pennsylvania Public Utility Commission.

Bernard A. Gould and *John J. Mahoney, Jr.,* for the Bureau of Enforcement, Interstate Commerce Commission.

Ralph Pomerance for the Urban Environment Conference.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

By order entered June 15, 1973, the Commission instituted this investigation under parts I, II, III, and IV of the Interstate Commerce Act, and more particularly under sections 5a and 12(1) thereof, 49 U.S.C. § 5b and 12(1), [and the equivalent sections of parts II, III, and IV of the act, and of U.S.C.], to inquire into the activities of carrier organizations, operating pursuant to collective ratemaking agreements approved under section 5a of the act, for the purpose of determining whether any of those agreements should be required to be amended in any respect.[1] Some 28 specific areas of inquiry were

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[1] Section 5a of the Act (49 U.S.C. 5a) reads as follows:

AGREEMENTS BETWEEN CARRIERS

Sec. 5a [*June 17, 1948*] [*49 U.S.C. § 5b.*]

(1) For purposes of this section—

(A) The term "carrier" means any common carrier subject to part I, II, or III, or any freight forwarder subject to part IV, of this Act; and

(B) The term "antitrust laws" has the meaning assigned to such term in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914.

(2) Any carrier party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commision may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5), or (6) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph.

(3) Each conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under the provisions of this section shall maintain such accounts, records, files, and memoranda and shall submit to the Commission such reports, as may be prescribed by the Commission, and all such accounts, records, files, and memoranda shall be subject to inspection by the Commission or its duly authorized representatives.

(4) The Commission shall not approve under this section any agreement between or among carriers of different classes unless it finds that such agreement is of the character described in paragraph (2) of this section and is limited to matters relating to transportation under joint rates or over through routes; and for purposes of this paragraph carriers by railroad, express companies, and sleeping-car companies are carriers of one class; pipe-line companies are carriers of one class; carriers by motor vehicle are carriers of one class; carriers by water are carriers of one class; and freight forwarders are carriers of one class.

(5) The Commission shall not approve under this section any agreement which it finds is an agreement with respect to a pooling, division, or other matter or transaction, to which section 5 of this Act is applicable.

(6) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure.

(7) The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigate and determine whether any agreement previously approved by it under this section, or terms and conditions upon which such approval was granted, is not or are not in conformity with the standard set forth in paragraph (2), or whether any such terms

(footnoted continued on next page)

set forth in the order, and all carrier members of ratemaking organizations, hereinafter called rate bureaus or bureaus, party to approved section 5a agreements were made respondents. The respondents as well as any other interested persons were invited to participate in the proceeding.

The Commission has approved numerous section 5a agreements between and among groups of common carriers by rail, motor, or water, and of freight forwarders, relating to the organization and procedures for the joint consideration, initiation, or establishment of rates, fares, classifications, divisions, allowances, or charges, and rules and regulations pertaining thereto, when such agreements are shown to be in furtherance of the national transportation policy. In effect, section 5a sanctions concerted ratemaking whereby the ratemaking organization is the legal entity through which the carrier members engage in joint or collective action. The approval of such agreements accords the signatory carrier members relief from the operation of the antitrust laws with resepct to the making and carrying out of the terms of the approved agreement.

The Commission has not prescribed any particular form of agreement and each agreement may be tailored to meet the needs of the particular carrier group and its shippers, subject to the statutory standards and prohibitions of section 5a and standards established by the Commission on a case-by-case basis. Certain of the confederated carrier groups are engaged in the collective establishment

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(footnote 1 continued)

and conditions are not necessary for purposes of conformity with such standard, and, after such investigation, the Commission shall by order terminate or modify its approval of such agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standard or to the extent to which it finds such terms and conditions not necessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardship.

(8) No order shall be entered under this section except after interested parties have been afforded reasonable opportunity for hearing.

(9) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6), hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commision.

(10) Any action of the Commission under this section in approving an agreement, or in denying an application for such approval, or in terminating or modifying its approval of an agreement, or in prescribing the terms and conditions upon which its approval is to be granted, or in modifying such terms and conditions, shall be construed as having effect solely with reference to the applicability of the relief provisions of paragraph (9).

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of rates and related matters governing the transportation of property (or passengers) within a stated territorial or geographic area, or interterritorially between defined territories. Other approved agreements are of a specialized nature, involving collective determination as to the classification of property, per diem and demurrage charges, and compensation for use of carrier and shipper-owned equipment, compensation for use of carrier-owned trailers and containers in trailer-on-flatcar service; or pertaining to specialized motor carrier transportation of specific commodities within a given territory or nationwide, such as, automobiles, bulk commodities in tank vehicles, cement, household goods, heavy hauling, iron and steel articles, oilfield equipment, wearing apparel, and others. In order to promote competition between and among carriers of the same and of different modes, no one carrier group is afforded a monopoly in a given territory.

This investigation was instituted primarily in response to inquiries and criticisms raised in the pending investigation in Ex Parte No. 270, Investigation of Railroad Freight Rate Structure, suggesting that the terms and structure of the agreements, and the operation of various ratemaking bureaus implementing the agreements, are not in furtherance of the national transportation policy as required by the act. In view thereof, the Commission undertook selective field investigations of various rail and motor rate bureaus in late 1972 and early 1973, and thereafter, formulated the 28 areas of inquiry under consideration in this proceeding.

By order dated November 15, 1973, the Commission's Bureau of Enforcement was directed to file and serve a statement of verified facts and of argument setting forth the matters developed in the field investigations, as well as from other sources, regarding the conduct of the carrier rate bureau as a catalyst for the subsequent submission of initial statements of facts, arguments, and opinion by the respondents and other interested parties. It was also ordered that the reports of the field investigations relied upon by the bureau be made available for inspection by any interested party, but that such specific procedure for inspection was limited to this particular proceeding and was not to be construed as a precedent in other proceedings. The same order also denied a request of the Department of Justice for issuance of subpoenas duces tecum upon certain carriers and rate bureaus. A renewal of that request was denied by subsequent order of February 21, 1975.

More than 240 initial statements of fact, argument, and opinion were filed by carrier rate bureaus, individual carreiers, shippers,

State regulatory bodies, governmental entities, and individuals, to which numerous replies were filed. All of these statements have been considered and reviewed in the light of the statutory standards and prohibitions of section 5a of the act, as well as the standards promulgated by the Commission on a case-by-case basis.

For ease of discussion, the specific areas of inquiry will be grouped and listed by subject matter.

Questions 1-3
PRELIMINARY

1. Do rate bureaus assist or hamper the making of appropriate rates?
2. Are changes in procedure necessary to foster actions more favorable to bureau members, shippers, and the general public?
3. Does the right of independent action adversely affect the rate structure?

The overwhelming consensus of the parties is that rate bureaus assist in the making of appropriate rates. Carriers and most shipper interests express the opinion that the bureau method of collective ratemaking and agency or individual tariff publication, involving numerous daily rate changes, constitutes the only physically manageable way of reviewing the voluminous tariff matter affecting their interests.

We agree that the rate bureaus perform the important task of providing a forum for the orderly formulation of rates and governing rules for the transportation of almost every conceivable type of commodty moving in commerce. Once formulated, the rates are published by the bureaus in tariffs applicable to all who participate in them. The evidence submitted shows that this compilation is a practical necessity for carriers and shippers in a society as highly industrialized as ours. The parties stress that rate bureau tariffs provide shippers with a convenient source for comparisons of competitive rates which would be virtually impossible without agency tariffs. Shippers rely on this source for input in pricing and transportation cost decisions. It is clear in our view that rate bureaus serve a useful function in ratemaking.

However, because of the unique immunity which the carrier members of ratemaking organizations possess, a finding that the bureaus assist in the making of appropriate rates is not sufficient standing alone. The public interest requires a standard of conduct which is exemplary, and which is responsive and responsible to the shipping public which relies so heavily upon regulated transportation to meet its overall needs. In approving section 5a agreements, the Commission has established, in addition to the statutory requirements, various essential standards for the collective processing of ratemaking proposals. These primarily include the clear and orderly recital of procedures which are definite and certain, and the giving of adequate public notice of all proposed tariff changes, as well as recommended and final dispositions. Therefore, we shall proceed to consider whether changes in procedures would foster actions more favorable to bureau members, shippers, and the general public.

The response to this inquiry was divided according to interest. Shippers and shipper associations, joined by the State regulatory agencies, merely answered "yes" to this question, but offered no specific suggestions for change at this point. However, strong sentiment was expressed by many shipping interests for more, or total, standardization of bureau operations to prevent delay and eliminate secrecy. Uniformity, it was argued, would reduce unwieldy procedures and prevent an alleged expanding autocratic role of some ratemaking organizations.

The carriers and their ratemaking organizations oppose any changes and defend their present procedures. These procedures are described as fair, equitable, and thoughtfully designed to administer, what is referred to by one respondent, as "an adversary activity." Uniformity is opposed on the grounds that the ratemaking bureaus are only extensions of the carrier members, and that each carrier group should have sufficient autonomy to determine its own course within the limits of the law.

Our field investigations did not reveal any significant abuse of procedures employed by the ratemaking bureaus. As mentioned earlier, there is presently no standard form of agreement prescribed by the Commission in the formation of ratemaking organizations under section 5a. We adopted this policy to allow for regional and operational differences inherent in the transportation industry. There is insufficient evidence on this record to warrant the prescription of a uniform section 5a agreement. Such a rule would be counterproductive.

However, some instances of potential for abuse, inconvenience, and delay were noted in our field investigations and in the evidence submitted. Although this report subsequently will require that some uniform procedural changes be made in approved agreements, total uniformity has not been shown to be in the public interest.

One procedure that cannot be changed (except by legislation) is the right of independent action, the subject of the third area of inquiry. This right is guaranteed by section 5a(6) of the Interstate Commerce Act, and requires that every agreement must accord to

each party signatory thereto the free and unrestrained right to take independent action either before, or after, any determination arrived at through the collective action procedures established by the agreement. Without such a provision the proposed agreement must be denied. Therefore, it is found in every presently approved agreement under section 5a. This question, however, is designed to determine whether the right of independent action has an adverse effect upon the rate structure.

Certain parties argue that the use of an independent announcement by a carrier is "free advertising" or an attempt to persuade the shipping public that a proposed lower rate is that level at which any carrier could effectively operate. Such arguments must be rejected for lack of substantiation. Our field investigations have not shown that there is any validity to these contentions. Instead, the overwhelming evidence shows that the right of independent action is essential to the efficient functioning of our transportation system and must, in no manner, be allowed to be impaired.[2] The right is often used by carriers and tends to promote competition between and among carriers of the same mode and competing modes. Accordingly, we conclude that the right of independent action does not adversely affect the rate structure.

Questions 4, 5, 6, and 7

4. Should a system be established by the Commission to monitor public hearings before rate bureaus?
5. Should formal minutes or verbatim transcripts be required of rate committee proceedings?
6. Should copies of correspondence and documents concerning all rate bureau meetings be filed with the Commission; and should Commission representatives attend all such meetings?
7. Should a uniform system of accounts be promulgated for rate bureaus?

These areas of inquiry all concern the advisability of increased Commission supervision over ratemaking organizations. With regard to question No. 4, the Commission has authority under section 5a(7) of the Act to investigate, upon its own motion and initiative, whether any agreement previously approved is in conformity with the standards set forth by section 5a. Of course, this power extends to the monitoring of the activities of carrier ratemaking organizations.

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[2] Nevertheless, it should be recognized that independent action carried to its extreme could destroy a rate structure and render meaningless the concept of collective action.

With minimal exception, both carrier and shipper interests oppose any monitoring program. It is argued that such a program would be an undue fiscal burden upon the bureaus and the Commission, and would tend to inhibit the free exchange of ideas between and among the member carriers. The evidence of record fails to indicate a need for a formal program of constant monitoring. We agree that such a program would be burdensome, time consuming, and expensive, without offsetting benefits. Accordingly, on this record there is no present need for a formal system of monitoring public hearings by the Commission before ratemaking organizations. However, pursuant to our powers and responsibilities under the act, random inspections of bureau proceedings will be conducted, and specific complaints of irregularities will be accorded priority attention.

We come now to the degree of recordkeeping to be imposed upon the bureaus. Much of the evidence submitted similarly opposed detailed recordkeeping as unduly burdensome and prohibitively expensive. Some parties questioned the term "rate committee" since it could encompass a diverse number of groups depending upon the particular internal organization adopted by any given bureau. Many shippers also complained that there are serious gaps in the reporting by some bureaus concerning the reasons for adoption or rejection of rate proposals. In this connection, our prior field investigations revealed many incomplete bureau docket records.

Under regulations promulgated by the Commission pursuant to paragraph (3) of section 5a, and codified at 49 CFR 1253.20, every carrier organization operating under an approved agreement is required to maintain, among others, reports or minutes of all proceedings at any oral, committee, or public hearing, and all such records shall be kept and filed in such a manner as to be readily accessible for examination by Commission representatives. We agree that to require verbatim transcripts of rate committee proceedings, or the filing of copies of all correspondence and documents concerning all rate committee meetings are, and would be unduly burdensome and expensive to the bureaus as well as the Commission. Rate committee meetings are considered to mean any meeting or discussion at which proposed new or changed rates and related matters are discussed by member carriers or their rate committees. The maintenance of adequate records of bureau activities as prescribed by the Commission is essential for continued antitrust immunity and the orderly functioning of the ratemaking activity. To this end, it is our intention to intensify field investigations of rate bureau activities to ensure compliance with the prescribed recordkeeping requirements.

Responsive to assertions by shippers concerning the lack of information as to justification for the disposition of ratemaking proposals, it is our opinion that the public notice of recommended final dispositions should contain the reasons for the action taken. It is expected that the agreement procedures will be appropriately amended to reflect such a standard.

As to question 7, there is no significant opposition on the record to the prescription of a uniform system of accounts for ratemaking organizations. In our view, such a system will aid our accelerated monitoring and inspection procedures. Although the field investigations did not reveal any significant financial irregularities, we are of the opinion that a uniform system of accounts should be prescribed by the Commission. Such a system will facilitate the comparison of reported financial information in the current year with that of prior years; compare financial and other information between carriers; provide assurance that information is accumulated, accounted for, and reported in a consistent manner; and provide a reasonable means of accumulating concise and comparable statistical data. Such a system of accounts will also aid in the orderly audit of ratemaking organizations by the Commission pursuant to its regulatory function, and improve the quality of the information and documentation with a significant decrease in audit time and cost to both the bureau and the Commission.

Accordingly, we conclude that a uniform system of accounts should be promulgated for rate bureaus, and we shall prepare such a system with a view towards the institution of a rulemaking proceeding prior to any such prescription.

Questions 8, 9, 10, and 11

8. Should rate bureaus be prohibited from furnishing any services, including technical and professional services, to another rate bureau or any other nonmember?

9. May a rate bureau invest in another commercial business, whether related or unrelated to its primary function of processing and publishing rates and related matters for member carriers?

10. Should rate bureaus be prohibited from acquiring other rate bureaus without Commission approval?

11. Should rate bureaus be profit-making enterprises?

These areas of inquiry relate to specific practices uncovered at one or more ratemaking organizations by the field investigations subsequently made public. One ratemaking bureau, operating under its own approved agreement, had entered into a contract with another bureau, operating under its own approved agreement, whereby the former would provide services such as office space, personnel to compile, print and publish tariffs, and collect charges and fees for the latter. Also, provision for technical and professional services, including representation before this Commission, was included.

The response elicited tended to misinterpret the thrust of this area of inquiry. The word "services" was generally taken to refer only to items such as computer and data sharing, cost and traffic studies, and related traffic activities. Despite the fact that all material had been available for public inspection prior to the receipt of evidence, the majority of the response was negative, i.e., that there should be no such prohibition thereby preventing costly and time consuming duplicity of work.

On this record, a broad prohibition against "any services" is not warranted. In the interests of economy and efficiency, we believe that the exchange of transportation data is desirable. No restriction is warranted upon the furnishing of services to members so long as they are supporting services not conflicting with the bureaus' primary function—serving as a forum for the collective determination of rate matters or an agency publishing tariffs for participating carrier members under approved procedures, as well as the gathering and dissemination of statistical traffic and transportation information.

We see no objection to bureaus furnishing services such as printing and computer sharing to nonmembers to reduce the costs of operation. However, no carrier organization can be permitted to place itself in the position to exert influence or pressure upon the substantive policy determinations involving another carrier group. Such action is a *de facto* merger or control without Commission approval and contrary to the spirit of section 5a of the act and a possible conflict of interest. Carrier groups are to refrain from any similar contractual arrangements without prior Commission approval and to divest themselves from such contractual relation where existing.

The next enumerated area of inquiry is also an outgrowth of our initial field investigations, and one which we also felt required further investigation. Our field investigations revealed that a ratemaking organization had invested several thousand dollars in a commercial business venture not related to its primary function. The venture subsequently declared voluntary bankruptcy and the members of the ratemaking organization suffered a monetary loss.

Generally, ratemaking carrier groups are nonprofit organizations. They advise that their tax-exempt status would be affected were they to make such commercial investments. Individual carriers, State regulatory agencies, and shippers overwhelmingly felt that the Commission should prohibit such activity. Also, the parties to this investigation believed that any losses suffered would eventually be reflected in higher rates to the shipping public in an effort to recoup such losses. Although a few parties felt that such a decision was completely and properly within the managerial discretion of the carrier members and their organization officials, there was no real objection to the formal institution of such a prohibition.

We are of the opinion that such a prohibition is necessary. Such commercial ventures are clearly beyond the function and scope of ratemaking organizations under their approved agreements. The functions of the bureaus are to publish, or cause to be published, tariffs for the account of the member carriers, and to carry on various other housekeeping duties. *Middle Atlantic Conference—Agreement*, 283 I.C.C. 683, 690. The antitrust immunity conferred upon the carrier members does not extend, nor will we allow it to extend, to such extracurricular activities as commercial investment by the bureaus. Strict adherence to the approved terms of the agreements is an absolute necessity for the continued approval of their agreements. We will not, and cannot, condone a practice whereby shippers may be forced to bear the ultimate costs of unsuccessful ventures in unrelated areas.

Ratemaking organizations may, however, wish to invest in Government bonds or the like to build a reserve for years when operations may be on the deficit side, but not otherwise. Accordingly, we conclude that rate bureaus may not invest in another commercial business, whether related or unrelated to its primary function of processing and publishing rates and related matters for member carriers.

This next area of inquiry concerns a serious matter uncovered by our field investigation. That investigation found that a ratemaking organization, operating pursuant to its own approved agreement, had acquired control of another ratemaking organization, also with an approved agreement, through a purported "sale." Salaried employees of the purchaser bureau were found to be acting as officers of the purchased bureau, and maintaining all records at, and conducted all business from, the offices of the purchaser bureau. Commission approval for this action was not sought, nor was the Commission advised of the transaction.

The contract of sale contains a clause which granted "the right and full administrative direction and control, as well as ministerial duties of publishing rates, tariffs, and handling proposals for and in the name and on behalf of (the seller)." The contract further provides:

> The parties hereto, based upon advice of counsel, are unaware of any requirement or necessity for the submission of this contract to the Interstate Commerce Commission or to any other Federal or State agency for approval as a condition precedent to the lawful effectuation of this transaction.

From the text of the contract, and in actual practice, there has been a complete takeover. An examination of the approved agreement of the purchaser bureau indicates that there are no approved provisions which provide for the assumption of another ratemaking organization's duties or territorial scope of influence.

The purchaser bureau does not deny the existence of the contract nor the facts as set forth above. However, it argues that the purchased bureau maintains full autonomy, even though provided with office space, employee services, preparation of tariffs, use of staff and facilities of the purchaser, filing and posting of tariffs, financial accounting services, and preparation of annual reports to this Commission. Despite all these services, the relationship is described as an "arrangement" under which the purchaser performs for compensation certain "administrative and ministerial functions" for the other. Such an "arrangement" was arrived at, it states, upon advice of counsel with no desire to evade regulation.

Comment submitted by other parties strongly urges that Commission approval is necessary for *any* type of action affecting a section 5a agreement. We agree. Such unapproved acquisitions are not consistent with the public interest. Prior Commission approval is necessary to insure that the bureau remains responsive to the shipping and receiving public in that region. Such an acquisition, whether called that or merger, is not merely a change of agent, nor a matter of managerial discretion. It is contrary to the terms and conditions of the approved section 5a agreement and does not promote the goals of the national transportation policy.

From the very earliest days of the enactment of section 5a, it has been axiomatic that the relief from the antitrust laws provided by paragraph (9) of section 5a obtains only where the approved agreement is carried out strictly in conformity with its provisions and within the terms and conditions prescribed by this Commission. See

Eastern Railroads—Agreement, 277 I.C.C. 279. In *Pacific Inland Tariff Bureau, Inc.—Agreement*, 293 I.C.C. 113, 114, a broad provision for cooperation and agreement with other associations was partially responsible for denial of the application. The Commission there stated:

> Without intending to deny this right to bureau members, applicants are reminded that any agreement entered into with another association which includes purposes covered by section 5a requires our approval before relief from the operation of the antitrust laws can be extended to such procedures.

Therefore, the approval of an agreement does not constitute approval of any subsequent change therein. It follows that any change in rate procedure, or organizational matters pertaining to the carrier group, without prior submission to and approval by the Commission, makes continued approval subject to further investigation and consideration by the Commission, under section 5a(7) of the act for the purpose of determining whether a prior approval should be terminated. Cf. *Specialized Motor Carriers Assn.—Agreement*, 293 I.C.C. 265, 269; *Tobacco Transporters Freight Traffic—Agreement*, 288 I.C.C. 517, 521.

Accordingly, approval extends only to the signatory carrier parties to an agreement and to the specific provisions contained therein. The bureau is merely the agent of the carrier principals and it is incumbent upon them to exercise control over their bureau agent. Any change without the Commission's express approval negates the immunity previously conferred. Therefore, we conclude that the purported sale, and any future similar attempts without prior Commission approval, is hereby forbidden as not in the public interest. All rights, privileges, and immunity granted under section 5a extend solely to those carriers signatory to the agreement and are not transferable as a right within their discretion.

However, there are methods of lawfully effecting a joinder of two ratemaking organizations. One method is by inclusion or incorporation of the one carrier group within the framework of the organization of the other. Prior thereto, it is necessary to obtain the approval of the Commission by appropriate amendment to the surviving agreement, and concurrently to seek termination of the agreement for the merged carrier group. If the merged carrier group is, for example, of a specialized nature by commodity or otherwise, it may be necessary, and possibly advisable, to establish a separate ratemaking group within the surviving organization. See, for example, the order of the Commission, Review Board Number 4, dated December 6, 1973 (not printed), in section 5a Application No. 2 (Amendment No. 21), *Western Railroad Traffic Association-Agreement*, approving a broadening of the jurisdiction of the Association by inclusion of Illinois Freight Association Territory rail carriers as a subregional organization of Western Trunk Line Committee and subject to separate ratemaking procedures; and termination of the approval of the agreement of Illinois Freight Association in section 5a Application No. 21.

Under the circumstances, it is expected that immediate action will be taken by any bureau that has acquired or has controlling interest in another to divest itself of such control or to file an appropriate application with the Commission in the matter.

In Question 11, we consider the basic structure of ratemaking organizations—whether nonprofit or profitmaking. The Commission has not specified either particular form and has approved both types. At present, with few exceptions, carrier organizations are operated as nonprofit groups. Those bureaus that operate as profitmaking entities have come under criticism recently. Accordingly, we have now reconsidered our earlier approach and included this element in our investigation.

As we have noted earlier, the bureaus are service organizations, financed by fee assessments of the members, and not entrepreneurial. As such, the element of profit has been attacked as not compatible with the strict service function of organizations operating with antitrust immunity. The bureaus are agents, and all costs incurred by an agent will be passed on, and absorbed, by its principals, and eventually by the shippers and the general public. Conversely, any profit would likewise be for the account of the principals—but with no corresponding benefit to the shipping and receiving public.

The spirit of section 5a, with its unique antitrust immunity, was never intended to generate profits, and in our opinion, conflicts with the bureaus' service function. Profits or surpluses of bureaus may be used to cover operating expenses, prepare for anticipated growth, and for research leading to improved efficiency of the organization's functions. The profit element may lead to conflicts of interest or preference to outside interest. We are convinced that ratemaking organizations may become subservient to strong outside elements as some participants have alleged.

Accordingly, we conclude that ratemaking organizations operating pursuant to approved section 5a agreements should not be profitmaking enterprises. Those few organizations which presently operate for profit must restructure their organization consistent with the views expressed herein, and furnish the Commission with their new organization plan within 120 days from the date of service of this report. It is expected that such restructuring be complete within 1 year.

Questions 12, 13, 14, and 15:

12. May a carrier member of a bureau, which carrier is affiliated in any way with a shipper, serve on the bureau's board of directors, general rate committee, or any other committee which has an effect, either directly or indirectly, on the ratemaking function of the bureau?

13. Should a maximum period be prescribed for the processing of proposals to final disposition?

14. Should public notice of proposals identify the proponent carrier?

15. Should rate bureaus be prohibited from broadening the territorial or commodity scope of an individual proposal without public notice?

These next areas of inquiry are directly related to the internal ratemaking function, and produced considerable response. It can be said that Question 12 is very specific regarding any shipper-carrier affiliation and whether a carrier with such affiliation "may" serve, and if so, to what degree within the collective ratemaking function. It is appropriate to review briefly the history and present case law in this area.

This question poses a problem not previously considered by the Commission. Our field investigations clearly revealed that the number of shipper-affiliated carriers has grown substantially in recent years, and that these carriers are members of ratemaking organizations and participate extensively in the ratemaking process. Consequently, this Commission is obligated to examine that role and determine whether that participation is consistent with the public interest and the national transportation policy. While the investigation and case law cited herein relate to motor carriers, the subsequent determination has equal application to all regulated modes of transportation.

There is no question that affiliated carriers may become members of approved ratemaking organizations. The nature of the affiliation, whether wholly owned or not, is not determinative for the purposes of this investigation. The role that they play is. This Commission has received numerous objections to those shipper-affiliated carriers occupying positions on bureaus' boards of directors, general and standing rate committees, and specialized committees, on the grounds of conflict of interest and possible discrimination. The carriers themselves deny that such grounds exist and assert that every regulated carrier is obligated to adhere to the provisions of the Interstate Commerce Act and, in addition, to show a profit and be responsive to stockholders as any other profitmaking entity.

Our investigation revealed no overt pattern of undue pressure, discrimination, or anticompetitive practices. However, it did reveal a number of questionable relations and practices which must be considered. All documented instances of shipper-affiliated carriers participating in the ratemaking functions of rate bureaus were contained in the field investigative reports of record. Our determination is based upon those reports, the evidence submitted by the participants, and the application of existing law and legislative intent to the situation as we have determined it to exist.

The Commission has approved transactions by which shippers have obtained control of regulated common carriers if those transactions are shown to be "consistent with the public interest" within the meaning of section 5(2) of the act. See *e.g., Encinal Terminals—Control—Shippers Express Co.,* 109 M.C.C. 536. Generally, the Commission has denied approval where discrimination might result from such an arrangement. Other Commission decisions have found that favoritism from common control can result in two ways. First, assured traffic which a common carrier can obtain from an affiliated shipper could afford it a competitive advantage over other carriers which would be inconsistent with the public interest. Secondly, a commonly controlled carrier might favor its affiliate against the interests of other shippers. See *e.g., McCloud River Trucking Co.—Purchase—Zamboni,* 101 M.C.C. 131.

Accordingly, the Commission in various proceedings has imposed certain restrictions and conditions upon the parties to such proposals, and reserved jurisdiction to impose such further terms, conditions, and limitations as might be required in the public interest to assure compliance with those conditions. Restrictions and conditions are not always imposed, and shipper control of, or affiliation with, motor common carriers is not condemned *per se.* See, *McLeod Trucking, Inc.—Control and Merger—Carson,* 109 M.C.C. 712. Decisions of the Commission involving shipper-affiliated carriers have historically been predicated upon compliance with section 5 of the act, and not section 5a. However, this investigation presents a new extension of those cases not previously considered.

The Commission, in administering the regulatory laws applicable to common carriers engaged in interstate commerce, is under a duty to see to it that the principles of the national transportation policy are carried out. The enactment of section 5a provided for no relief from any provisions of law other than the antitrust laws. The approval of a collective ratemaking agreement does not alter the fact that all provisions of the act continue to apply to the carriers and to action taken by them to the same extent and in the same manner as though such agreement had not been approved. Accordingly, this Commission retains jurisdiction to investigate and ensure that the public interest and the national transportation policy are being properly served and not abused.[1]

When considering matters under section 5a, the public interest is a basic standard upon which the Commission approves or disapproves a proposed agreement; and the public interest is, in turn, determined and defined by the national transportation policy. Our investigation has determined that the present procedures employed by some ratemaking organizations pertaining to shipper-affiliated representation on boards and committees have an effect upon the ratemaking function of those bureaus which is contrary to the directives of the national transportation policy.

As previously mentioned, we charge no carrier, shipper, or ratemaking organizations with any overt improprieties in this regard. In our view, however, it is important to eliminate even the appearance or possibility of malfeasance, misfeasance, undue influence or conflict from the function of those organizations sanctioned under section 5a. We are convinced that such relations could cause the objectivity and fairness of even the best-intentioned carrier representatives to suffer when considering rate questions in the light of their particular shipper-affiliates' interests.

Responsive to this question, affiliated carriers deny that they are influenced in any way by their parent shipper companies, and argue that they must "pull their weight" on the consolidated balance sheet. Such arguments of independent corporate identity, however, are unpersuasive in light of documented examples of undue influence revealed in our investigative reports.

Accordingly, we conclude that a carrier member of a bureau, which carrier is affiliated in any way with a shipper, may not serve on a bureau's board of directors, general rate committee, or any other committee which has an effect, either directly or indirectly, on the ratemaking function of the bureau without specific prior Commission approval.

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[1] See the legislative history of Section 5a as reported in In-House Report No. 1100, issued by the Committee on Interstate and Foreign Commerce, as reported in U.S. Code Congressional Service, 80th Congress Second Session, 1948, pages 1844-1860

The next question deals with the imposition of a maximum period for the processing of rate proposals to final disposition. The term "final disposition" means adoption, rejection, or withdrawal of rate proposals, including appeal procedure, if any, so as to render such a determination administratively final within the agreement procedures. Our field investigations revealed instances of exceptionally long periods of time for the disposition of rate proposals, in excess of 18 months, without apparent justification. As a result, a prescribed time limit is being considered.

The shipper interests and State regulatory agencies complain that many interstate rate proposals are unduly delayed without justification. These shippers point out that, in many instances, they suffer inordinate delays of their proposals. Admittedly, most shipper proposals are processed expeditiously, but these parties allege that delay can, and has been used, as a tactic to defeat a proposal which they view as necessary. In summary, it is urged that the lack of a time limit for the disposition of proposals looms as a major potential for abuse requiring corrective action, a view shared by the State agencies.

In rebuttal, individual carriers and their rate bureaus deny the allegations of undue delay. They argue that many proposals are complex and require adequate time for investigation of the merits. It is their position that to impose a time limit for the disposition of proposals would, in practice, result in an increased rate of proposal rejections and be counterproductive. It is argued that these rejections would require redocketing which would be unduly burdensome, time consuming, and expensive.

We are aware that most agreements do provide time periods for each step of the collective process, including appeals to recommended dispositions. However, agreements approved shortly after the passage of section 5a of the act often do not contain any time limitation for the collective action procedure and, in some instances, the procedures can be characterized as vague and indefinite under our current section 5a standards.

We recognize that most rate proposals are processed in an administratively efficient manner and the record does not support arguments that a time limitation would increase the rate of denial. A competitively motivated proposal demands quick action, whether proposed by a carrier or a shipper. Such a time prescription will have no effect upon the overwhelming majority of rate bureaus operating efficiently. However, we believe that stated time periods must be established for each stage of the collective process and such time periods should be specifically stated in each agreement. The entire ratemaking process should also be subject to a reasonable maximum period for final disposition.

In our opinion, a maximum period of 120 days is reasonable and should be prescribed for the processing of proposals to final disposition. We recognize that there may be situations where this time limit may result in hardship in carrying out the collective process, such as complex interline or interterritorial adjustments and nationwide classification changes. In these situations, we believe that the bureaus must maintain adequate records justifying any delays beyond the maximum 120 day period.

We conclude that currently approved agreements must be amended by appropriate application to the Commission for approval of time limits for each stage of the collective process, subject to a maximum period for final disposition of 120 days.

Question 14 inquires whether public notice of proposals should identify the proponent carrier. Our investigation has revealed that a few ratemaking organizations do disclose the name of a proponent, but that many do not. Accordingly, the question thus becomes: shall this Commission require all ratemaking organizations to disclose the proponent of a proposal?

Shipper interests overwhelmingly support disclosure by arguing that present practice promotes secrecy. The carrier interests strongly oppose disclosure. The case against the imposition of such a uniform rule is succinctly stated by the Southern Freight Association as follows:

> Those who urge that the identity of a proponent be made public do so out of motives designed to enhance their self-interest to the detriment of the carriers. Such knowledge can serve no useful purpose and can only be put to malevolent use by those who desire it.

This strong statement may overstate the case, but the record shows that many shippers are in a position to coerce, not by showing a proposal unreasonable, but by selectively withholding traffic from specified carriers. Those shippers who are not in the same strong economic position will derive no significant benefit from disclosure. Knowing the identity the proponent invites retribution by those shipping interests who are capable and thereby defeats the collective nature of rate bureaus.

Where the identity of a proponent is made known, there is no evidence that it results in more favorable action to any party than where it is not made known. This investigation has confirmed what experience teaches, that many proposals are submitted which are not individual in nature, but which will have application to all carrier members holding authority to move that particular commodity. What benefit would accrue to any party to identify a particular carrier as a proponent?

We are not unmindful of the lingering sentiment among shipping interests for the imposition of such a requirement. In fairness to all, were we to impose such a rule, we would be obliged to require that shipper proposals also identify the proponent. Such action has elicited responses which call this unfair because such a course of conduct could prematurely divulge future marketing policies, plant and/or warehouse relocation, and similar advance business planning. On balance, we conclude that there is no present need to require that public notice of proposals must identify the proponent carriers. However, this should not be interpreted by those ratemaking bureaus who do identify the proponent as a requirement to change procedures already in effect. We merely decline to make disclosure mandatory and leave the ultimate decision to carrier management and the free interplay of competition.

The next question deals with the broadening of the territorial or commodity scope of an individual rate proposal without further public notice. Under some early agreements, generally involving the rail rate bureaus, a proposal which is docketed with public notice may thereafter be broadened in commodity description or territorial scope without further public notice. However, the overwhelming number of subsequently approved agreements do not allow this. Our investigation reveals sufficient reason to warrant reappraisal of the public notice rule for broadened, or changed, proposals.

In some instances, individual rate proposals are changed after docketing and after public notice to either add or delete points of origin, destination, or commodity descriptions. Those bureaus that support the retention of this privilege argue that a prohibition would destroy needed flexibility and prevent common effective dates while seriously delaying the ratemaking process. They also feel that such a prohibition would needlessly penalize member carriers and shippers for having tried to insure that the "adjustments" were equitable and in compliance with the law. In support of this position, the bureaus state that shippers, "with considerable regularity," propose reduced or other advantageous tariff changes for application only on those commodities and between those points that the shipper is interested in; and that the bureaus will broaden the proposal to include other points to protect the interests of competing producers. In addition, it is argued that the Commission's complaint and suspension procedures are adequate remedies to guard against misuse of the privilege.

In opposition, many shippers allege that the evidence does not support the contention that it is the shipper who is responsible for the broadening of docketed proposals. They also object on the grounds that such a practice does not allow them, as affected parties, to participate in the ratemaking process. Such shippers or receivers may have been unaffected by the proposal in its original form, but become "interested parties" and affected without their knowledge. Some shippers and their associations see the possibility of a broadened proposal as a device to hide some unknown ultimate intention, or to modify many existing rates by beginning with an obscure original proposal.

There is merit to these contentions of the shippers. We view this issue as one of fairness and due process. Our major concern is that all affected parties to any rate change proposal be afforded adequate public notice and an opportunity to be heard and to participate. This is central to the scheme and reasoning underlying the antitrust immunity granted to carrier members of ratemaking organizations under section 5a. The Commission's complaint and suspension procedures, which are alleged to be sufficient protection to shippers, are not a substitute for fairness at the rate bureau level.

The prohibition against the broadening of proposals without public notice would have no serious impact upon those bureaus operating pursuant to approved section 5a agreements. Indeed, the record indicates that the impact will be minimal since most ratemaking organizations either presently operate with such a written restriction, or honor it in practice. We cannot accept the argument that a tariff filing in itself is sufficient notice. All interested parties are entitled to notice and an opportunity to make representations for or against a proposal, especially one which has been broadened. Such a requirement is completely compatible and consistent with the intent of section 5a.

Therefore, we conclude that rate bureaus must be required to amend their agreements to prohibit broadening the territorial or commodity scope of an individual rate proposal without additional public notice. In fairness, that further notice must be given in the same manner as the original to ensure that due process is accorded all interested parties.

Questions 16 and 17:

16. Should rail rate bureaus provide shortened special procedures governing the processing of proposals directly related to the filing of special docket applications with the Commission, informally seeking authority to award reparations on past shipments?

17. Should handling of section 22 quotations by rate bureaus be prohibited entirely or, in the alternative, should rate bureaus be limited to notifying the membership of a quotation adopted by a member carrier independently or jointly with another carrier?

These two areas of inquiry relate to specialized internal procedures of ratemaking bureaus and will be discussed separately. Number 16 relates only to rail rate bureaus. However, many of the participating rail carrier parties did not discuss this question. Number 17 has application to all organizations operating pursuant to approved section 5a agreements.

Special docket applications, as considered in question number 16, are voluntary petitions by rail carriers requesting authority to pay refunds as reparations, or waive collection of undercharges, on the Commission's informal docket. Such petitions are admissions by the carrier that the applicable rate, rule, or charge was unjust and unreasonable under the circumstances and conditions existing at the time of a movement. Commission authorization is necessary for the refunds or waivers to be made, and only the carrier or carriers involved may file these petitions. This procedure is an informal and inexpensive one which enables the concerned carriers to refund a portion of the applicable but unreasonable rate; Commission authorization protects the public against unlawful rebates.

It has been the practice of rail carriers to informally file with the Commission a registration of past shipments in order to toll the operation of the statute of limitations pending consideration of the merits of a shipper claim. However, our experience has been that there have often been long delays between the initial filing by the carrier of such registration and the filing of the special docket application which would permit an award of damages under rule 25(e) of the Commission's General Rules of Practice.

The delay is generally caused by the failure of each participating carrier to expeditiously process the claims and promptly indicate whether it is willing, voluntarily, to make the adjustment sought.

These claims are matters exclusively within the internal control of each carrier. Rate bureau procedures are not involved until such time as the carrier initiates a proposal to establish a changed rate at a just and reasonable basis. Under presently approved procedures of the several rail rate bureaus, the processing of rate changes by two or more carriers can be accomplished in approximately 2 weeks after initiation. This time period includes public notice of initiation, assuming that no objections are raised. If only one carrier is involved, it is similar to an independent announcement and no delay is expected. Of course, these proposals, like any other, are now covered by the new 120 day rule for the processing of proposals which we prescribed earlier in this report.

It is our opinion, therefore, that the delay is not with the rate bureau handling of such matters, but with the individual carriers. The railroads have only their conscience as a guide to the speed with which they process such claims. While we condemn unnecessary delay, new procedures cannot be prescribed within the context of this investigation. The evidence is clear, and we so conclude, that there is no need for the promulgation of any special ratemaking procedures governing the handling of special docket procedures by rate bureaus. This question, however, will be made the subject of further investigation by the Commission.

Question 17 pertains to rate bureau handling of rate quotations under section 22 of the Interstate Commerce Act. This section permits common carriers to provide transportation services free or at reduced rates for the United States, State, or municipal governments, as well as other enumerated persons and groups, without regard to other provisions of the act. Pursuant to paragraph (2) of section 22 of the act, relief under section 5a is limited to traffic for the United States Government, or any agency or department thereof. Present procedures of some bureaus provide for collective determination of section 22 quotations. These procedures, however, are separate from other rate proposals for the reasons stated in *Southern Motor Carriers—Agreement*, 323 I.C.C. 396, and many of the agreements which do contain such procedures limit notice of a proposal to the member carriers and the governmental agency or agencies for whom proposed.

Generally, the tender of a quotation by an individual carrier to a governmental agency is essentially a matter of contract, arrived at through arms-length negotiation, and applicable only between the contracting parties. In such instances, the quotation is similar to an independent announcement when presented to the bureau, and does not invoke the collective action procedures of the bureau. However, there are instances where two or more carriers will wish to tender a quotation, and it is to this situation that the separate collective action procedures of the bureau are directed. It is to this situation, then, that this area of inquiry is directed. Many parties responding to this investigation failed to make this distinction, and it is critical that the distinction be understood.

Although it is the overwhelming opinion of the parties responding that section 22 should be repealed and the Commission has so recommended, we are here faced with the choice of allowing present procedures (where they exist) to continue, of prohibiting ratemaking organizations entirely from handling section 22 quotations, or restricting existing procedures. We are convinced that the evidence of record is not sufficient to warrant a total prohibition, but that some restriction upon the present collective action as applied to section 22 quotations is necessary.

This investigation has disclosed efforts of at least one ratemaking bureau to channel section 22 quotations through its organization for the stated purpose of "stopping needless dissipation of revenue through unnecessary rate cuts." The meaning of such a statement is obvious. Such action is absolutely contrary to the intention of this Commission when we allowed the special section 22 procedures to be instituted, and is an abuse of the process. Attempts by a bureau to interfere with carrier management are inconsistent with its service function and contrary to the public interest.

We are aware that the United States Government is one of the Nation's largest shippers, if not the largest. Accordingly, the Government can exercise strong leverage when dealing with an individual carrier. Many bureaus contend that their present procedures for setting collective quotations offer a measure of protection from strong pressure and alleviate the disparity in bargaining power. Others supporting the retention of these special procedures because their members rely heavily upon Government traffic, both freight and passenger, for large percentages of revenue. We are aware of all of these arguments, but are constrained to remind the transportation industry that such arguments have merit only when any given ratemaking organization maintains approved special procedures as required by *Southern Motor Carriers—Agreement, supra.* Many of the bureaus submitted strong defenses of procedures that are not part of their own approved agreement.

Therefore, in the absence of approved special collective section 22 procedures, ratemaking organizations do not enjoy the antitrust immunity conferred by section 5a(9) of the act if participating in activities concerning section 22 quotations. In any event all bureaus must limit their activities to notifying member carriers of section 22 quotations and processing such filings.

Questions 18, 19, 20, and 21:

18. Should general rate increase proposals be required to be placed on the rate bureaus' dockets and made subject to public hearings, prior to filing with the Commission?

19. Should the Commission obtain and publish reports of the deliberations within the industry concerning the matter of general increases?

20. Should the various motor rate bureaus join in seeking general rate increases, instead of filing on an individual bureau basis?

21. Should the railroads in the alternative to "20", be required to substantiate general increases on a regional basis?

The next four areas of inquiry all relate to the processing of general increases and whether the Commission should order changes in the procedures currently in effect. While some relate specifically to rail bureaus, and others to motor bureaus, it must be understood that unless otherwise restricted, the areas of inquiry and the subsequent findings have application to all modes regulated by this Commission.

Question 18 contemplates a requirement that proposals for general rate increases be placed on the public docket of rate bureaus for public hearings prior to filing with the Commission. The evidence, and our experience, indicates that many motor carrier rate bureaus already do so, but that the other modes generally do not. Those parties, mostly shippers, who favor current motor carrier practice becoming mandatory, argue that public hearings will narrow areas of dispute and thereby shorten the approval procedure before this Commission. The motor carrier bureaus state that this is their current practice, but they would prefer that it remain a matter of discretion, rather than a mandate.

Opponents of such a requirement assert that it would cause undue delay with no corresponding benefit to any party. The railroads argue that the public is protected by refund provisions, and that public hearings would not reduce the time required to collect and present the necessary data. In addition, it is argued that the time spent in public hearings dealing with individual shippers' commodities would have little significance to the issue of overall revenue need which is ultimately considered by the Commission.

We have carefully considered all the evidence and argument presented in this investigation relative to this area of inquiry. The question is whether such a requirement is needed to ensure that the shippers' and public interest is protected without imposing an undue burden upon the carrier members. Our conclusion is that no such present need exists.

This Commission has adopted special procedures to consider general rate increase proposals which are adequate to provide all interested parties sufficient time to express views and register protests. These procedures have occasionally resulted in criticism concerning delays in general increase proposals. Under the circumstances, we are convinced that the additional time that would be consumed by mandatory public hearings prior to filing with the Commission would not result in any significant savings of time after filing because of the many diverse interests involved in such proceedings. In addition, mandatory public hearings would be inconsistent with the need to provide emergency relief in those situations where it is required.

However, our position must not be taken to mean that those bureaus which do place general rate increase proposals on the public docket must, or should, cease that practice. On the contrary, our conclusion is merely that a uniform requirement should not be imposed at this time. This decision, upon consideration of all the evidence, is one which should be left to the discretion of the carrier members so that they may continue to operate in a manner best suited to their needs. The evidence simply does not indicate that such a requirement is necessary within our regulatory function.

Accordingly, we conclude that general rate increase proposals should not be required to be placed on the rate bureaus' dockets and made subject to public hearings, prior to filing with the Commission. We leave this to the discretion of the individual carrier members with the admonition that we will continue to monitor this area as well, and that our authority under section 5a permits us to change our position should future events warrant.

The action contemplated by Question 19 differs from those previously discussed in Questions 4, 5, and 6 because it would require this Commission to assume the active responsibility for obtaining and publishing the reports of carrier deliberations. This is not a question of law, but one of policy which must be determined in light of the need shown as weighed against the effort required and the projected benefits.

Those opposed to this proposal maintain that such activity on the part of the Commission would be frivolous, expensive, and burdensome, while lending nothing of value to general increase proposals. Many carriers argue that the information contemplated is already available widely through newspapers and trade journals that are nationally distributed, and raise the further argument that it might be a restriction of a carrier spokesman's freedom of speech. At the very least, it is felt such an activity would have a "chilling effect" upon free discussion within the industry.

On the other hand, many shippers favored such reporting initially, but also express concern that the burden placed upon the Commission would be oppressive and detract from the attention that should be expended upon the proposal itself. It is also argued that the Commission might find itself in the position of publishing the industry's self-serving statements at a large cost in time and manpower. The question of how deeply "within the industry" the Commission should delve is also posed. In sum, there is no strong support for the institution of this procedure.

We have carefully considered all of the arguments put forth, including the question of need. On balance, we conclude that such activity by this Commission at this time is not warranted. We reject the argument that such an activity would infringe upon the freedom of speech. Furthermore, many of the large increase proposals tend to follow the line of labor negotiations and are filed to offset the resultant increase of labor cost. Accordingly, the publicity surrounding such proposals is usually adequate to keep the public informed.

Therefore, we are convinced that the available alternatives are sufficient. While it is our responsibility to oversee the conduct of rate bureaus and to pass upon the merits of proposed general increases, we do not now consider adoption of this proposed reporting proper unless and until a necessity is shown therefor. The evidence does not support such a showing at this time.

The question of whether the various motor carrier rate bureaus should jointly file general increases, raised by Question 20, is also a question of policy. Sentiment has been expressed recently by some members of the shipping and receiving public for the consideration of joint filings on the grounds of convenience, and this investigation is well-suited to measure the wisdom of such requests.

The record reveals an almost across-the-board negative response. The difference in regional costs which, most agree, is substantial enough to make joint filing inappropriate. It is argued that joint filing would tend to reflect the costs of either the least efficient carriers, or of operations in the regions of the country with the highest costs of operation.

Parties in support were a distinct minority. Attention was directed to current procedures of the rail rate bureaus and we were asked to impose a uniform standard. This we will not do, for uniformity alone does not provide a sufficient rationale. We have looked to the cost levels of motor common carriers in the different regions of the country and based our conclusion largely on such data which are available in the public statements regularly compiled by our Bureau of Accounts and widely distributed to, and used by, the carriers and the shipping public in proceedings before this Commission.

In our opinion, each region has its own revenue needs and cost characteristics and such differences which should be preserved. Cost and revenue increases also have differing impacts, upon various types of carriers and shippers in different regions. Accordingly, each territory or rate bureau should be allowed to determine the amount of increase required in its territory and be required to justify that amount before this Commission on a regional basis.

Because of the large number of regulated motor common carriers, an analogy to the methods of the railroads which are far fewer in number, is not proper. This point will be discussed further in the report. Since we are not convinced that sufficient benefit would be derived from the imposition of the considered requirement to offset the factors we have noted above, we conclude that it should not be required.

Question 21 relates solely to rail rate bureaus. The prevailing response was that the rail rate bureaus should be required to substantiate their general increase proposals on a regional basis. The arguments put forth resemble those in the previous question with the difference in costs between territories being the common denominator. Certain trade associations argue that increases should reflect the economic conditions and needs of rail carriers in each territory, and that western roads should be prevented from pointing to the eastern roads as evidence of revenue need.

In opposition, the railroads argue that their operations are unlike the motor carriers because theirs is an integrated "system," and as such, all roads are interrelated to a greater degree than motor carriers. The smaller number of railroads, as opposed to motor carriers, was urged as a prime reason for continuing present procedures. We believe that the railroad arguments have merit, and that the filing of general increase proposals solely on a regional basis would not produce any substantial savings of time or enhance the result.

Presently, data submitted by rail carriers in support of general increase proposals is integrated nationwide, but is broken down individually and territorially. See *e.g.*, Ex Parte No. 281, ***Increased Freight Rates and Charges, 1972,*** 341 I.C.C. 288. The nature and extent of evidence to be submitted by individual railroads and by regions is presently under consideration in Ex Parte No. 290, Procedures Governing Rail Carrier General Increase Proceedings.

On the record before us, we see no reason to require the railroads to file general increases on a regional basis.

Questions 22, 23 and 24:

22. Should rate bureaus be prohibited from protesting independent action proposals?

23. Should a rate bureau be limited on protesting independent action proposals to instances in which the proposed rate is less than long-term variable cost?

24. Should rate bureaus be prohibited from protesting or in any other way discouraging independent action proposals?

The issues raised by this group of questions have often been considered by the Commission. The question of whether to allow rate bureaus to protest the independent action proposals of member carriers is a very difficult and complex one to answer, but one which must periodically be reexamined in light of changing conditions in society and the transportation industry. A brief review of selected prior decisions on this question is included to assist in an understanding of the history of the response, and to aid in placing what follows in proper perspective. Since all of these questions are related, they will be discussed together.

One of the clearest expressions of this issue is to be found in ***Southern Motor Carriers—Agreement,*** 297 I.C.C. 603. In that proceeding, the protestants urged that the proposed agreement not be approved because the bureau had reserved the right to petition the Commission for the suspension of rates or tariff changes proposed by carrier members in the exercise of their right of independent action. In support of their position, protestants argued that conference employees and large influential carrier members could exercise coercion and intimidation against members who attempt to independently publish rates or charges not in conformity with conference views; and that the exercise of such a function by the bureau is in direct conflict with the free and unrestrained right of an individual carrier member to take independent action. It was also asserted that the bureau's right to protest is a breach of the principal agent relationship that could not be tolerated. The conference replied that its activities were not confined solely to filing rates, but that it had responsibilities in the areas of legislation and regulation was, in fact, a trade association similar to associations of shippers. In addition, the bureau pressed its assertion that a petition for suspension was an aid to the Commission because it brought to the Commission's attention rates which might be unlawful and which might otherwise have gone undetected.

The Commission there determined that the central issue was "whether the agreement accords to the conference members of the free and unrestrained right to take independent action in making tariff changes." It was concluded that the practice of conferences of filing petitions for the suspension of proposed rates of member carriers is sanctioned and authorized by section 216(e) and (g) of the act, and that the right to take independent action by conference members is distinguished from, and does not conflict with, the equally established right of the conference, or any other person or body politic, to protest or complain of any such action.

We have discussed this particular case in detail because the Commission has often adopted the reasoning contained therein and affirmed the right of rate bureaus to petition for suspension of independent action proposals of member carriers. See *e.g., Central States Motor Common Carriers—Agreement,* 299 I.C.C. 773. Prior proceedings had already adopted the bureaus' argument that the right to protest is an aid to the Commission in the administration of the act and the prevention of destructive rate cutting; and that it is manifestly impossible, as a practical matter, for the Commission to scrutinize each and all of the multiplicity of tariffs and rate changes that are constantly being filed. See *Middle Atlantic Conference—Agreement,* 283 I.C.C. 683, 689. Subsequent applications for approval under section 5a have eliminated the specific provision reserving the right of the bureau to protest, but the argument over this right, or privilege, persists.

The argument and opinion submitted by the parties to this investigation has been, for the most part, identical to those received over the years. The persistence with which those objections have been filed, however, has persuaded us to reexamine our interpretation of the relevant sections of the act, and to reevaluate the results such an interpretation has had upon the public and the transportation industry in light of the unique immunity which section 5a(9) confers upon the carrier members of ratemaking organizations.

The record reveals sharp division of opinion between the carriers and their bureaus on one hand, and shippers and their trade associations on the other. Carrier interests base their arguments on the premise that the bureau always acts on behalf of its member carriers, protecting them from destructive competitive practices and attempts at short-term gain by "ill-advised" carriers who do not realize that their actions may be detrimental to all carriers in the region. The major motor carrier bureaus view the protest as an announcement to the shipping public of the general membership's opinion of the protested proposal, and as an aid to smaller carriers who do not possess the necessary expertise (or funds) to protest on their own behalf. The bureaus continue to assert that their protests of independent announcements are an aid to the Commission—making it aware of a proposal that may be unjust and unreasonable, or otherwise unlawful under the act. Since the Commission is the final arbiter, they point out that their protest is not only a public service, but a right assured by section 216 of the act which grants " *** any interested party ***" the right to protest and request suspension of a proposed tariff provision.

Opponents of the right to protest by bureaus take issue with the bureaus' position, and restate the arguments raised in prior proceedings. Shippers and their trade associations view the right, and the practice, as intimidation and coercion of smaller or "innovative" carriers who do not possess the resources to defend their proposals against the collective weight, funds, and expertise of the bureaus. These parties assert that the protest, or threat of protest, works to keep the level of rates artificially high by discouraging carriers who wish to file a reduced rate on traffic in which other carrier members participate.

While recognizing the language of section 216(g), the shipper interests argue that the proper interpretation of that section should restrict the right to protest only to carriers, and that the bureaus should be allowed to protest, if at all, only in the name of a member carrier who is clearly identified. These interests insist upon an absolute prohibition of bureau action in its own name. The practice of allowing the bureau to protest a member's independent action is viewed as a substitution of bureau discretion for that of carrier management, and a denial of the carrier members' absolute right of independent action.

We have not found evidence of any flagrant abuse by rate bureaus in the exercise of the right to protest. While there is evidence that the number of bureau protests are not numerically high, selective protests can be an effective as mass protests to obstruct competition and choke rate initiatives. Moreover, we approach this issue with the belief that antitrust immunity must be strictly and narrowly construed, and that equity is also a consideration. We are as much concerned with the threat as with the practice.

Upon careful reconsideration of this issue, we are now persuaded that present circumstances dictate a greater emphasis on independent action necessitating a change in interpretation. The right of a carrier member of a ratemaking bureau to take independent action at any time in the ratemaking process is absolute. Any opposing rights, therefore, are indirect conflict and must be subordinated. This position was well stated in the dissent in *Arbet Truck Lines, Inc.*, v. *Central States Motor Freight*, 321 I.C.C. 460, 471, reading as follows:

> Since it was the Commission's approval of a section 5a agreement which brought the defendant into being and thus enabled it to act as a complainant or as a protestant in Commission rate proceedings, it can hardly be contended that the defendant's right to protest the rates of carriers is absolute and unqualified. Motor carrier rate bureaus were created for the purpose of facilitating commerce, not restraining it, and to further, not undermine, the objectives of the national transportation policy. ***

Even though, as indicated, the practice of rate bureaus in protesting rates has been conducted in a manner that is generally fair and devoid of base motives, we believe it is necessary to limit the bureaus' right to protest in order to foster independent action. The right of independent action is paramount to maintaining the integrity of the grant of antitrust immunity. Section 5a specifically provides for the complete preservation of the right to take independent action both before and after a determination by members to publish other rates. If an individual carrier objects to the rates independently filed by another carrier or by several carriers, independently, it has the same opportunity and resources to file its protest or complaint with the Commission as the carrier proponent.

We believe that using the bureaus as a method of policing the independent actions of a few carriers has the practical effect of stifling competition.

The interpretation of section 216 of the act was also discussed in the *Arbet* case, *supra:*

> Even recognizing that a *** rate bureau is a distinct entity, a "person" within the meaning of sections 216(e) and (g), what is the derivation of its right to act as a complainant or as a protestant in Commission rate proceedings? Obviously, that right is not derived exclusively from section 216 because the rate bureau, but for section 5a, could not operate lawfully with respect to important rate matters and probably would not even exist.
>
> Obviously, it is section 5a which enables *** rate bureaus lawfully to engage in a number of activities otherwise proscribed by the antitrust laws. It is necessary, therefore, to harmonize section 5a and sections 216(e) and (g) of the act. ***

We agree that the bureaus' rights under section 216 are not absolute and unqualified. We repeat that any antitrust immunity must be strictly construed, and that to continue to allow rate bureaus to protest the independent action proposals of member carriers would be an abuse of the administrative process rather than an aid as previously believed. In our view, equity dictates a similar conclusion. Accordingly, we answer question No. 22 "yes,,.

Having reached this conclusion with regard to question 22, it is obvious that the limitation based on costing proposed by question 23 must be rejected. In respect to the independent announcement proposals of member carriers, we have previously concluded that the prohibition is absolute. Consequently, question 24 becomes moot. Any form of harrassment or discouragement of the filing of independent action proposals by members of a bureau, by bureau personnel, or by bureau representatives will of course not be tolerated.

If the right of independent action is to remain absolute and viable, and if the prohibition against bureau protest of members' proposals is to be adhered to faithfully, it is incumbent upon the various rate bureaus of all modes to comport themselves in good faith with this new standard. We recognize that there will be some lingering apprehension. Nonetheless, any attempts to continue the same practice with the charade of a change in name of protestant only or any other device will result in a further investigation to determine whether or not our approval of an approved agreement should be withdrawn pursuant to our authority under section 5a(7).

Accordingly, we conclude that rate bureaus are prohibited from protesting independent action proposals of member carriers in any way or from discouraging initiation of independent action proposals of members.

Question 25:

25. Should rate bureaus be prohibited from discouraging members from publishing individual tariffs?

Our field investigations revealed that one motor carrier ratemaking bureau had been engaged in a concerted effort to discourage, and apparently to eliminate, individual tariffs of its carrier members. The tactics included letters, proposals to amend the bureau's bylaws, and employment of an individual to personally call upon carrier members in an attempt to dissuade them from publishing individual tariffs. Accordingly, this area of inquiry was included to determine whether such conduct was currently employed elsewhere, and whether it was necessary to impose an administrative prohibition.

The evidence shows the clear division between shipper and carrier interests. Carriers stress efficiency, claiming that the consolidation of individual tariffs in bureau agency publications eliminates duplication of tariff publication and provides any interested party with a single source from which to determine applicable rates. Shipper interests counter by citing the statute which guarantees each carrier the free and unrestrained right of independent action, and they argue that the large ratemaking bureaus are attempting to influence the carriers to conform by publishing only in bureau agency tariffs.

Although no further evidence of similar activity by other bureaus was uncovered, there is merit to the arguments put forth by the shipper interests. It is clear that to preclude individual tariff publication acts as a restraint upon the right of independent action of individual carriers. In *Central States Motor Common Carriers—Agreement,* 289 I.C.C. 517, 525, the Commission, Division 2, held that the establishment of a proposed rate "*** clearly includes the choice by the individual carrier of assigning publication of its determination to an agent or of making its own publication. Unless the carrier has that choice, it does not have the free and unrestrained right contemplated by the statute." More recently, it was stated even more succinctly: "There can lawfully be no restraint imposed by a conference which would prevent a carrier from publishing its own schedules. *Notice of Independent Action,* 332 I.C.C. 22, 29."

Whether the restraint is contained in the agreement, or whether it exists *de facto;* the result is the same. However, such language does not mean that a rate bureau should be prohibited from lending its expertise or offering comments or suggestions when its opinion is sought. The bureau must, however, be prohibited from pressing members upon its own initiative to cancel individually published tariffs and to utilize only bureau publications.

While we recognize that it may be beneficial to many shippers, and carriers, to have all carrier rates for a given movement in one tariff, on balance, the carriers' right of independent action and managerial discretion must take precedence over convenience. We do not wish to belabor the point of a carrier's right of independent action. Enough has been written to have it clearly understood that this right is paramount and absolute. However, it is a matter of discretion with carrier management as to when, and under which circumstances, that right is to be exercised. The choice must rest with the carrier and no impingement upon that choice can be tolerated.

Accordingly, we conclude that rate bureaus are prohibited from discouraging members from publishing individual tariffs. Any bureau whose approved agreements contain provisions or procedures to the contrary shall be appropriately amended.

Questions 26 and 27:

26. Should immunity continue to be extended to agreements which permit discussions, etc., with respect to proposals of single-line movements?

27. Should immunity from antitrust laws be continued?

These next two areas of inquiry speak to a relationship between the collective ratemaking process and the antitrust immunity of section 5a. However, before we consider Question 26, which involves a limitation upon antitrust immunity, we should first discuss Question 27 which asks whether antitrust immunity should be continued at all. While this question is basic to this entire proceeding, we have reserved it for the latter portion of this report because it was feld that greater insights might be gained after all other specifics had been considered.

The antitrust immunity of section 5a is statutory, and our power is to grant or deny carrier applications for section 5a relief.[4] With the notable exception of the United States Department of Justice, no party to this proceeding advocates that the Commission's authority to grant antitrust immunity be withdrawn or curtailed. At this point, this proceeding has mandated several procedural and organizational changes in approved section 5a agreements which the evidence indicates will better effectuate the goals of the national transportation policy and effective regulation.

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[4] An excellent discussion of the anticompetitive aspects of conference ratemaking appears in *Rate Bureaus and Antitrust Conflicts in Transportation: Public Policy Issues,* by Grant M. Davis and Charles S. Sherwood (Praeger Publishers, 1975). The report contains a resume of rate bureau development, and an analysis of the economic and procedural framework for conference ratemaking. The authors conducted a study evaluating the effects of rate bureau activity on competition. One conclusion they reached was that antitrust immunity for single-line rates should be retained.

We are convinced from the evidence of record that the Commission's administration of section 5a has contributed significantly to the creation of an effective and dependable national transportation system. The changes mandated herein, and the investigative approach utilized, are a more effective method of ensuring such a system than the denial of antitrust immunity. Such denial would be a giant step backwards in effective regulation of stable rate structures and reduce this Nation's transportation system to a state of uncertainty with respect to reasonable and lawful levels of rates. We conclude that immunity from antitrust laws should be continued.

We now return to the question of whether such antitrust immunity should be restricted so as not to apply with respect to proposals for single-line movements. This proposition was soundly rejected by virtually all carriers as well as shipper parties on the grounds that collective consideration of single-line and joint-line rates cannot practically be separated. That is, what may be a single-line rate for one carrier can be part of a through joint rate for another, and the elimination of antitrust immunity for single-line discussion will destory the very essence of collective ratemaking. While this argument may seem simplistic at first glance, further scrutiny reveals that it has merit.

The record is particularly persuasive in showing the need for rate bureau member carriers to consider and discuss single-line rates in conjunction with their joint-rate activities. We are cited to numerous examples of the symbiosis of single-line and joint-line rates. Without attempting a complete restatement of these examples some of the more significant categories of situations described in the record are as follows:

1. *Removal of preferential treatment of shippers.* In *Washington Potato & Onion Shippers Assn., Inc., v. U.P.R. Co.*, 300 I.C.C. 537 (1957), we found single-line and joint-line rail rates on potatoes prejudiced shippers in the State of Washington and preferred shippers in the States of Idaho and Oregon. Elimination of the preferences was ordered. Joint action of the involved railroads accomplished the required adjustments. This would not have been possible without consideration of single-line as well as joint-line rates.

2. *Dual capacity rates serving as single-line and joint-line rates.* Two situations are described. In one the single-line rate functions as both a single-line and a joint-line rate, illustrated by wheat gathering rates in producing territory which are single line to such milling points as Minneapolis-St. Paul but joint lines for movements to beyond milling points such as Chicago. In the other described situation conference joint-line tariffs expressly adopt single-line rates of carriers serving both origin and destination points for competitive joint-line routings between such points.

3. *Port equalization.* Import-export traffic moves to and from interior points through numerous ports along the various coasts. The routings can be competitive from different ports (for example, Seattle to Chicago and Los Angeles to Chicago) involving both single- and joint-line movements. Discussions by rate bureau members aid in eliminating inequalities in port relationships over both the single- and joint-line routings.

4. *Equalized opportunities for competing producing points.* There are numerous situations in which discrete producing points compete in the same market but are served by different transportation companies. One producing point may have single-line service to market while a competitor has joint-line service to the same market.[3] Inequalities in market opportunities would arise in the absence of consideration of the single-line rates along with the joint-line rates.

These situations could be multiplied many times on the basis of the record of this proceeding. Together they embrace service by all the different surface modes—rail, truck, motor passenger and water. They demonstrate a symbiotic relationship between single-line and joint-line rates which must be considered in order to maintain competitive equality for carriers as well as shippers, remove distortions in port relationships, effect compliance with statutory restraints against discriminations and preferences, and simply observe the realities of diverse rates in a coordinated transportation network. If rate bureau members were denied antitrust immunity to consider single-line rates in these situations, they could not function. Such a result would make virtually impossible joint-line service essential to a national transportation system.

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[3] Each point may have single-line service from separate carriers to the primary market. One example cited to us in the record is Sterling, Nebr., served by Burlington Northern to Chicago and Goodland, Kans., served by the Chicago, Rock Island & Pacific to the same market. Without rate equality one of these competing producing points would be economically disadvantaged. Joint consideration of their respective rates by rate bureaus avoids that result.

As one party stated in this proceeding, single-line traffic is the business that is most important to any carrier, and joint-line traffic is only an adjunct to performance of a full transportation service for customers. While we are not prepared to accept this statement as a general rule, we do recognize the importance of single-line traffic. In practice, a single-line rate published by a rate bureau generally has application to all carrier members holding authority to perform the involved transportation. In the case of motor carriers, the number of competitive carriers is often quite large. It is rare to find only one motor common carrier serving any two given points in single-line service. Accordingly, any change in the single-line rate of one affects the rate of at least one or more competing carriers. This is so regardless of whether the rate is published in bureau tariffs or individual tariffs, and regardless of mode.

Similarly, other carriers not holding single-line authority between the given points may wish to compete for the traffic in joint-line service with one or more connecting carriers. The result is a joint-rate determined through rate bureau discussion and procedure. In such a situation, single-line and joint-line rates for ratemaking purposes become so intertwined as to be inseparable in a cause and effect relationship. Herein lies the heart of the problem, which is also the heart of the collective ratemaking process between and among two or more carriers. If collective discussion of single-line rates is not allowed, each carrier will attempt to adjust its individual rates in an effort to expand or retain its share of available traffic. Other modes will also seek to capture the traffic. As each single-line rate is adjusted, every joint-line rate would be required to be readjusted in order to offer a competitive service. The result would be something less than a stable rate structure between any two or more points. When this reasoning is applied to the entire territory encompassed by most rate bureaus, it becomes obvious that rate stability will be a difficult goal. When considering the range of territory encompassed by some rail rate bureaus, the problem looms even larger.

The solution is just as obvious. Present practice must be retained. To prohibit collective discussion of single-line rates would force many carrier members with extensive single-line operating authority to file such proposals as independent actions, or to withdraw from participation in the bureau in favor of individual tariff publication. Experience teaches, and the evidence confirms, that carriers often need the technical assistance of the bureaus' staff when formulating rates on given commodities. Therefore, so long as carrier members have the right of independent action conferred by paragraph (6) of section 5a, and the bureau is prohibited from protesting member carrier rates, we are of the opinion that it is not advisable to impose any restriction which would have the effect of driving carrier members from participation in their respective bureaus. Such action would not foster the national transportation policy, but would seriously disrupt collective ratemaking which serves that policy. Accordingly, we conclude that immunity should continue to be extended to agreements which permit collective discussions with respect to single-line movements. Of course, in no way does our continued extension of immunity to agreements which permit collective discussions with respect to single-line movements interfere in any manner with a proponent's right of independent action.

Question 28:

28. Is additional legislation necessary, and should it be sought, to better effect the goals for which section 5a was enacted?

This final question was overwhelmingly answered in the negative by the parties. The responses submitted in this investigation indicated that there is no present need for additional legislation. More stringent compliance by carriers with the terms of their approved agreements was deemed the better course of action, and we agree. The additional standards established by this investigation will go far towards the needed reform of the collective ratemaking process.

There is one final matter which requires discussion. Many household goods carrier groups and the water carriers seek exemption from the application of any changes mandated by this investigation. It is their position that their respective members perform a "unique" service different from that of general-commodity carriers.

We must reject this request because there is no substantive difference in the collective ratemaking process regardless of mode or the nature of the service performed. To hold otherwise would negate all benefits derived from this investigation. Under the circumstances, the same standards shall apply to all carrier groups operating pursuant to approved section 5a agreements.

In accordance with this, and all other conclusions, all carrier respondents to this investigation should be required to file appropriate applications for approval of amendments to their respective agreements consistent with the conclusions in this report.

We also conclude that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

ULTIMATE CONCLUSIONS AND FINDINGS

Upon consideration of the entire record in this proceeding, we conclude and find that:

1. Rate bureaus assist the making of appropriate rates.

2. Procedural changes would foster actions more favorable to bureau members, shippers, and the general public; such changes being contained in the body of the report.

3. The right of independent action does not adversely affect the rate structure.

4. A system need not be established by the Commission to monitor public hearings before rate bureaus, but that formal minutes, and not verbatim transcripts, are required of rate committee proceedings.

5. Commission representatives may attend all rate bureau meetings; but that copies of correspondence and documents concerning all rate bureau meetings need not be filed with the Commission.

6. A uniform system of accounts for rate bureaus will be promulgated.

7. Rate bureaus are not prohibited from furnishing techinical and professional services to other bureaus or nonmembers provided that the limitations expressed in the report are observed.

8. Rate bureaus may not invest in another commercial business, whether related or unrelated to its primary function of processing and publishing rates and related matters for member carriers.

9. Rate bureaus are prohibited from acquiring other rate bureaus without prior Commission approval.

10. Rate bureaus may not be profitmaking enterprises.

11. A carrier member of a bureau, which carrier is affiliated in any way with a shipper, may not serve on a bureau's board of directors, general rate committee, or any other committee which has an effect, either directly or indirectly, on the ratemaking function of the bureau without specific prior Commission approval.

12. A maximum period of 120 days is prescribed for the processing of proposals to final disposition.

13. Public notice of proposals need not identify the proponent.

14. Rate bureaus are prohibited from broadening the territorial or commodity scope of an individual rate proposal without prior adequate notice.

15. Adoption of shortened special procedures involving proposals covering special docket applications are not warranted in this proceeding.

16. Section 22 quotations require special bureau procedures limiting notification to members and the governmental agency.

17. Docketing of rate bureau proceedings with respect to general rate increase proposals need not be mandatory.

18. The Commission need not obtain and publish reports of the deliberations within the industry concerning the matter of general increases.

19. The various rate bureaus need not join in seeking general rate increases.

20. The various rail rate bureaus are not required to substantiate general increases on a regional basis only, but that regional costs should be presented in a more explicit manner.

21. Rate bureaus are prohibited entirely from protesting proposals of carrier members, and are not merely limited to instances in which the proposed rate is less than long-term variable cost or any other specific instance.

22. Rate bureaus are prohibited from discouraging independent action proposals of member carriers in any way, including the protesting of the filing of any rates pursuant to such action.

23. Rate bureaus should be prohibited from discouraging members from publishing individual tariffs.

24. Immunity from antitrust laws shall be continued.

25. Immunity from the antitrust laws shall continue to be extended to agreements with respect to proposals of single-line movements.

26. Additional legislation is not necessary, and need not be sought, to better effect the goals for which section 5a was enacted.

We further conclude and find that all carrier respondents herein are required to file appropriate applications for approval of amendments to their respective agreements consistent with the requirements and standards set forth herein within 120 days.

COMMISSIONER HARDIN concurs in the result.

COMMISSIONER GRESHAM, concurring in part:

While I disagree with the conclusions of the majority insofar as questions 14 and 18 are concerned, I unequivocally join in its conclusions with regard to the remaining questions.

My response with regard to question number 14 is that public notice of proposals should identify the proponent carrier. My conclusion rests upon, among other considerations, answers to the following questions. Would such anonymity be possible absent the existence of rate bureaus? Was antitrust immunity accorded to rate bureaus for the purpose of obscuring the identity of the proponents of rate proposals? Should we permit antitrust immunity to serve as a means whereby the identity of proponents is kept from the public? In my opinion, each of these three questions should be answered in the negative.

While some of the parties to this proceeding have cited the possibility that carrier proponents of proposed rate increases would be subject to retaliation by shippers, others have professed the belief that identification of the carrier proponent of a proposal to decrease rates would amount to an invidious type of free advertising, and also would expose the proponent to reprisals by other carriers. Although somewhat beyond the scope of this question, because some rate proposals are sponsored by shippers, it is also necessary to consider the pros and cons of giving public notice of the identity of shipper proponents. In addition to arguments that here also retaliation could result, some parties argue that such disclosure would jeopardize the success of potential or future marketing plans of the shipper proponent.

In light of my views with regard to the above-noted questions regarding the purposes of the antitrust immunity of rate bureaus, and based upon the belief that it is possible to correct and/or prevent retaliation, the arguments and evidence submitted in this proceeding, do not convince me that there is justification for permitting concealment of the identity of any proponent, whether it be a shipper or a carrier. In my opinion the higher degree of candor in the market place, which should result from public disclosure, would be of benefit to the public ultimately. Insofar as arguments regarding possible retaliation and invidious advertising are concerned, the Commission could, and in the proper execution of its responsibility would, certainly take whatever measures are necessary to prevent or correct any such possible abuses.

Equally unconvincing is the argument that disclosure of the identity of a shipper proponent would pose a serious threat to the success of the potential marketing plans of the shipper. This alleged fear appears to be framed primarily in terms of conjecture, rather than in terms of evidence. Furthermore, it is noteworthy that shippers who appear before the Commission in support of applications for motor carrier operating authority must present evidence which specifically sets forth relevant information regarding present and future traffic patterns and/or marketing plans, and it does not appear that such disclosure has seriously jeopardized the success of their marketing plans. Furthermore, the Commission is capable of dealing with such problems should they arise.

I also disagree, in part, with the majority's response to question 18, regarding whether rate bureaus should be required to place general rate increase proposals on their dockets, and hold public hearings thereon prior to filing the proposals with the Commission. The information of record discloses that public hearings held by many motor carrier rate bureaus prior to filing their general rate increase proposals with the Commission have served a valid and very useful purpose. Based on the premise that many motor carrier rate bureaus are successfully utilizing this procedure, I would require all motor carrier rate bureaus to hold such hearings, with the following reservation. If a particular bureau believes that its circumstances are such that no useful or valid purpose would be served by its adoption of this procedure, or if beneficial effects are not produced by its attempt to utilize this method, that bureau could request the Commission to exempt it from this requirement.

Railroad general rate increase proposals are nationwide in scope rather than regional, and rail efforts to hold hearings of this nature resulted in unreasonable delay, and did not otherwise reap beneficial effects. Accordingly, I would not impose this requirement upon railroad rate bureaus. However, I would encourage them to study the successful efforts of the motor carrier rate bureaus, and to give some serious thought to the possibility of experimenting with holding such prior hearings perhaps on a regional basis.

VICE CHAIRMAN O'NEAL, whom COMMISSIONER BROWN joins, dissenting in part:

In my view the action taken by the Commission in this case is highly constructive. The final product for the most part responds affirmatively to some difficult problems that have arisen in a very complex area of transportation regulation. Agreeing with most of what the Commission is doing here, I am somewhat reluctant to issue a dissent, but I feel compelled to state my disagreement with the majority's answer to question 14. While the matter is not free from doubt, I believe that public notice of proposals should identify the proponent carrier, and also identify the shipper who is a proponent or for whom it is proposed, if there is one. Disclosure should be as complete and as early in the process as possible. A policy of total disclosure of a proponent's identity could increase competition in the market. The Commission should therefore prescribe a uniform disclosure policy respecting all rate change proponents whether an increase or decrease is proposed.

COMMISSIONER CORBER, dissenting in part:

This proceeding is the most thorough review to date of the operations and procedures of rate bureaus. The record amply demonstrates the essential part they play in developing and maintaining a coordinated and unified surface transportation system which is national in scope. In view of the role of rate bureaus in effecuating the national transportation policy it is important that we exercise our statutory responsibilities to assure that these collective action agencies promote the purposes of the act, not be coercive, faithfully observe the right of independent action, and not unreasonably restrain commerce. The measures adopted by the Commission in its order accompanying the report are reasonably calculated to further these objectives. I, therefore, concur in the report and order with the single exception of the restraints imposed on broadening docketed proposals in respect to commodity descriptions and territorial scope.

With regard to the power of rate bureaus to broaden, by territory or commodity description, docketed rate proposals, a number of examples are given in the record of circumstances in which the power has been exercised to avoid discriminations and preferences inhering in rate proposals limited to the narrow interests of the proponent. To require republication of rate proposals broadened for such purposes needlessly delays final action by rate bureaus and limits their ability to further the objectives of the act.

Nonetheless, the power to broaden proposals, particularly the power to broaden commodity descriptions, contains the threat of disadvantaging certain shippers in the marketplace. Although disadvantaged shippers may seek recourse to the Commission's suspension and investigation procedures, small shippers may lack the means to become aware of a broadened commodity description until the changed rates take effect, and they start to lose customers.

In order to balance the conflicting equities, rate bureaus should be required to publish promptly proposals broadened by territory or commodity descriptions but not redocket or otherwise delay consideration of such proposals. This would provide affected shippers with notice of a broadened proposal so that they could avail themselves of whatever procedures remain before effectiveness of the proposal, including this Commission's suspension and investigation procedures.

Rate bureaus should not be denied flexibility to make prompt determinations conforming to the requirements of the Interstate Commerce Act. Accordingly, I must dissent from that part of the report which requires redocketing or other delay in consideration of broadened proposals.

COMMISSIONER CLAPP did not participate.

APPENDIX A

Respondents and participating parties

Motor Carriers
AAA Trucking Corporation
A-P-A Transport Corporation
Adirondack Transit Lines, Inc.
Admiral-Merchants Motor Freight, Inc.
All-American, Inc.
All-Island Delivery Srevice, Inc.
Arkansas-Best Freight System, Inc.
Arrow Transportation Company, jointly with:
    Asbury Transportation Co.,
    Inland Transportation Company,
    Lee & Ester Tank Lines, Inc.,
    Transport Service,
    Widing Transportation, Inc., and
    James J. Williams, Inc.
Associated Transport, Inc.
Associated Truck Lines, Inc.
Auclair Transportation, Inc.
BN Transport, Inc.
B&P Motor Express, Inc.
B&T Transportation Company
Bee-Line Motor Freight Company
Birmingham Nashville Express, Inc.
Blue Line Express, Inc.
Bonanza Bus Lines, Inc.
Boss-Linco Lines, Inc.
Bowman Transportation, Inc.
Branch Motor Express Co.
Briggs Transportation Company
Brown Express, Inc.
Buanno Transportation Co., Inc.
Burris Express, Inc.
C. W. Transport, Inc.
Capitol Bus Company
Carolina Coach Company
Carpenter's Motor Freight, Inc.
Central Freight Lines, Inc.
Central Motor Lines, Inc., jointly with:
    Northern Freight Lines, Inc.
Century-Mercury Motor Freight, Inc.
Charlton Bros. Transportation Co.
Chicago Kansas City Freight Line, Inc.
Chief Freight Lines Company
Cole's Express
Consolidated Freightways Corp. of Delaware
Continental Trailways
Cooper-Jarrett, Inc.
Cossitt Motor Express, Inc.
Cowan, W. T., Incorporated
Crouch Bros., Inc.
Davidson Transfer & Storage Co.
Deaton, Inc.
Direct Winters Transport Limited, jointly with:
    Diredt Motor Express (Quebec) Limited.
Dodds Truck Line, Inc.
Dominion Consolidated Truck Lines, Ltd.
Dorn's Transportation
ET & WNC Transportation Co.
Eagle Motor Lines, Inc.
East Texas Motor Freight Lines, Inc.
Eastern Express, Inc.
Eastern Freight Ways, Inc.
Estes Express Lines
Federal Transfer Company, Inc., jointly with:
    I-5 Freightline, Inc.,
    Oak Harbor Freight Lines,
    Silver Eagle Company,
    Silver Wheel Freightlines, Inc., and
    Trans Western Express, Inc.
Fredrickson Motor Express Corporation
Friedman's Express
Garrett Freightlines, Inc.
Gordons Transports, Inc.
Graf Bros., Inc.
Greenwood Motor Lines
Greyhound Lines, Inc.
H&W Motor Express Company
Harder's Express, Inc.
Hajek Trucking Company, Inc.
Hemingway Transport, Inc.
Henderson Trucking, Inc.
Hennis Freight Lines, Inc.
Hermann Forwarding Company
Herriott Trucking Company, Inc.
Holmes Transportation, Inc.
Hudson Transit Lines, Inc.
IML Freight, Inc.
Illinois-California Express, Inc.

Motor Carriers—Continued

- Indian Trails, Inc.
- Inter-City Truck Lines, Limited
- Interstate Motor Freight System
- Jack Cole-Dixie Highway Company
- Jayne's Motor Freight, Inc.
- Jefferson Lines, Inc.
- John Himmer Transfer, Inc.
- Jones Motor
- Jones Transfer Company
- Kerrville Bus Company, Inc.
- Lake Shore Motor Freight Company
- Las Vegas, Tonopah, Reno Stage Line, Inc.
- Lee Way Motor Freight, Inc.
- Leonard Bros., Incorporated
- Leonard Express, Inc.
- Lovelace Truck Service, Inc.
- M&M Transportation Company
- Mahon's Express
- Mason and Dixon Lines, Inc.
- McLean Trucking Company
- McNicholas, J.V., Transfer Co.
- Michaud Bus Lines, Inc.
- Mid-Continent Freight Lines, Inc.
- Midwest Motor Express, Inc.
- Missouri Pacific Truck Lines, jointly with:
  - Texas and Pacific Motor Transport Co.
- Moon Carriers
- Motor Freight Express
- Mushroom Transportation Co., Inc.
- Nashua Motor Express, Inc.
- Nehalem Valley Motor Freight, Inc.
- Nelson Freightways, Inc.
- O.N.C. Freight Systems
- O'Donnell's Express
- Old Dominion Freight Lines
- Overland Western Limited
- Overnight Transportation Company
- P&G Motor Freight, Inc.
- Pacific Intermountain Express Co.
- Penn Yan Express, Inc.
- Perishable Deliveries, Inc.
- Perrow Motor Freight Lines, Inc.
- Pilot Freight Carriers, Inc.
- Preston Trucking Company, Inc.
- Quinn Freight Lines, Inc.
- R. C. Motor Lines, Inc., jointly with:
  - George W. Brown, Inc., and
  - George W. Brown, Inc., operator of K.M. Transportation, Inc.
- REA Express, Inc.
- Red Ball Motor Freight, Inc.
- Red Star Express Lines
- Rock Island Motor Transit Company
- Rooks Transfer Lines, Inc.
- Ryder Truck Lines, Inc.
- Sanborn's Motor Express, Inc.
- Schuster Express, Inc.
- Shay's Service, Inc.
- Shippers Dispatch, Inc.
- Smith's Transfer Corporation
- Synder Motor Freight, Inc.
- Spector Freight System, Inc.
- St. Johnsbury Trucking Company, Inc.
- Standard Trucking Company
- Strickland Transportation Co.
- Sullivan, R. M., Transportation, Inc.
- T.I.M.E.-DC, Inc.
- Taynton's Motor Freight
- Tennessee Carolina Transportation, Inc.
- Terminal Transport Company
- Texas, New Mexico and Oklahoma Coaches, Inc.
- Tidewater Inland Express
- Transamerican Freight Lines, Inc.
- Vallerie's Transportation Service, Inc.
- Van Brunt & Son Motor Freight Transportation
- Vermont Transit Company, Inc.
- Ward Trucking Corp.
- Wajer, P. & Sons Express Co., Inc.
- Wenham Transportation, Inc.
- Werner Continental, Inc.
- Wilson Freight Company
- Wilson Trucking Corporation
- Wooleyhan Transport Co.
- Wooster Express, jointly with:
  - Baltimore-New York Express, Inc.
- Yellow Freight System, Inc.

Railroads and Representatives

- Association of American Railroads
- Burlington Northern, Inc.

Railroads and Representatives—Con.

- Chicago and North Western Transportation Company
- Elgin, Joliet and Eastern Railway Company
- Southern Pacific Transportation Company

Shipping, Manufacturing, and Trade Interests

- Allied Chemical Corporation
- Allied Mills, Inc.
- Aluminum Association, Inc.
- American Cyanamid Co.
- American Retail Federation
- American Smelting and Refining Company
- American Textile Manufactures Institute, Inc., jointly with:
  - North Carolina Textile Manufacturers Assoc., Inc.,
  - South Carolina Textile Manufacturers Assoc., Inc.,
  - Traffic Department, and
  - Southern Traffic League, Inc.
- Archer Daniels Midland Company
- Armstrong Cork Company
- Asphalt Roofing Manufacturers Association, jointly with:
  - Builders Hardware Manufacturers Association,
  - National Association of Electrical Distributors,
  - Pencil Manufacturers Association, and
  - Steel Office Furniture Manufacturers Association
- Bethlehem Steel Corporation
- Canadian Fertilizer Institute
- Cargill, Incorporated
- Certain-Teed Products Corp.
- Champion International Corporation
- Cities Service Company
- Commercial Solvents Corporation
- Cushman, Frank M. Associates
- Drug and Toilet Preparation Traffic Conference, jointly with:
  - National Small Shipments Traffic Conference, and
  - Eastern Industrial Traffic League
- E.I. DuPont de Nemours & Co.
- Farmland Industries
- Fertilizer Institute
- Fort Worth Grain Exchange
- Garvey, Inc.
- General Environment Corporation
- Glass Container Manufacturers Institute Inc.
- Grain Processing Corp.
- Heeking Can Division—Diamond International Corp.
- Hormel, Geo. A., & Co., jointly with:
  - Oscar Mayer & Co.,
  - John Morrell & Co., and
  - Rath Packing Company
- Manufacturing Chemists Association
- Monsanto Company
- Motor Vehicle Manufacturers Association of the U.S., Inc.
- National Association of Food Chains
- National Industrial Traffic League
- National Retail Merchants Association
- Pacific Northwest Hardware & Implement Association, et al.
- Pacific Northwest Traffic League
- Phillips Petroleum Company
- Puget Sound Traffic Association
- Questor Juvenile Products Company
- Republic Steel Corporation
- Reynolds Metals Company
- Society of the Plastics Industry, Inc.
- Swift Edible Oil Co.
- Texas Industrial Traffic League
- Western South Dakota Traffic Bureau
- Westinghouse Electric Corporation

Motor Carrier Rate Bureaus

- Automobile Transporters Tariff Bureau, Inc.
- Central & Southern Motor Freight Tariff Association, Inc., jointly with:
  - Central States Motor Freight Bureau, Inc.,
  - Eastern Central Motor Carriers Association, Inc.,
  - Middlewest Motor Freight Bureau,
  - New England Motor Rate Bureau, Inc., and
  - Niagara Frontier Tariff Bureau, Inc.
- Garment Truckmen Association
- Household Goods Carriers' Bureau
- Household Goods Forwarders Tariff Bureau

Motor Carrier Rate Bureaus—Con.
Intermountain Tariff Bureau
Middle Atlantic Conference
Mover's & Warehousemen's Association of America, Inc.
National Bus Traffic Association, Inc.
National Motor Freight Traffic Association, Inc.
New York Movers Tariff Bureau, Inc.
Pacific Inland Tariff Bureau, Inc.
Perishables Tariff Bureau
Rocky Mountain Motor Tariff Bureau, Inc.
Southern Motor Carrier Rate Conference
Steel Carriers' Tariff Association, Inc.
Western Motor Tariff Bureau, Inc.
Wyoming Trucking Association, jointly with:
 Oil Field Haulers Associations, Inc.

Rail, Water and Freight Forwarder Rate Bureaus
Freight Forwarders Conference
Lake Cargo Demurrage Committee
Pacific Southcoast Freight Bureau
Southern Freight Association
Southwestern Freight Bureau
Tidewater Coal Demurrage Committee
Traffic Executive Association—Eastern Railroads
Trans-Continental Freight Bureau
Western Railroad Traffic Association
Waterways Freight Bureau

United States Government Agencies
Department of Defense-Secretary of the Army
General Services Administration
Interstate Commerce Commission—Bureau of Enforcement
United States Department of Justice
United States Department of Transportation

State Agencies
Illinois Department of Business and Economic Development
North Dakota Public Service Commission
Pennsylvania Public Utility Commission
Public Utility Commissioner of Oregon

Others
Local and Short Haul Carriers Northwest Conference
Urban Environment Conference, Inc., on behalf of:
 American Rivers Conservation Council, Environmental Action, Inc., and Sierra Club

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 3d day of June 1975.

EX PARTE NO. 297

RATE BUREAU INVESTIGATION

The Commission having this day made a report on its investigation of the activities of ratemaking organizations operating pursuant to agreements approved under section 5a of the Interstate Commerce Act for the purpose of determining whether any of those agreements should be amended, said report containing its findings and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That rate bureaus be, and they are hereby, required to keep formal minutes of all rate committee proceedings, and maintain such minutes for inspection by the Commission;

It is further ordered, That rate bureaus be, and they are hereby, prohibited from investing in another commercial business, whether related or unrelated to their primary function of processing and causing to be published rates and related matters for member carriers;

It is further ordered, That rate bureaus be, and they are hereby, prohibited from acquiring other rate bureaus without prior Commission approval;

It is further ordered, That rate bureaus be, and they are hereby, prohibited from operating as profitmaking entities;

It is further ordered, That carrier members of a bureau, which carriers are affiliated in any way with a shipper be, and they are hereby, prohibited from serving on a bureau's board of directors, general rate committee, or any other committee which has an effect, either directly or indirectly, upon the ratemaking function of the bureau without specific prior Commission approval;

It is further ordered, That a maximum period of 120 days be, and it is hereby, prescribed for the processing of proposals to final disposition in the absence of unusual circumstances and justification;

It is further ordered, That rate bureaus be, and they are hereby, prohibited from broadening the territorial or commodity scope of an individual rate proposal without adequate public notice;

It is further ordered, That in the absence of approved special procedures, rate bureaus be, and they are hereby, limited to notifying the membership and the governmental agency involved, of a section 22 quotation adopted by a member carrier;

It is further ordered, That rate bureaus be, and they are hereby, prohibited from protesting proposals of member carriers;

It is further ordered, That rate bureaus be, and they are hereby, prohibited from discouraging member carriers from publishing individual tariffs;

It is further ordered, That rate bureaus be, and they are hereby, prohibited from discouraging independent action proposals by members in any manner;

It is further ordered, That member carriers of rate bureaus be, and they are hereby, required to file appropriate amendments to their respective agreements consistent with the requirements, standards, and findings set forth in the attached report within 120 days of the date of service of this report and order;

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

JOSEPH M. HARRINGTON,
Acting Secretary.

(SEAL)

APPENDIX D

Served January 30, 1976

30839

INTERSTATE COMMERCE COMMISSION

Ex Parte No. 297

RATE BUREAU INVESTIGATION

Decided January 23, 1976

Upon reconsideration, findings in prior report, 349 I.C.C. 811, affirmed and clarified. Appropriate order entered, and proceeding discontinued.

Appearances as shown in prior report, and in addition: *George P. Bell, Jr., L. M. Cuttcliff, L. A. Parish, Robert B. Reedy,* and *G. F. Walters* for shipper interveners.

Report and Order of the Commission on Reconsideration

By the Commission:

This proceeding was instituted "to inquire into the activities of ratemaking organizations operating pursuant to approved section 5a agreements for the purpose of determining whether we should require any of these agreements to be amended in any respect." All carrier members of ratemaking organizations, hereinafter called rate bureaus or bureaus, party to approved section 5a agreements were made respondents. Some 28 specific areas of inquiry were considered, based on numerous initial statements of fact and argument and replies thereto.

In the prior report and order, 349 I.C.C. 811, decided June 3, 1975, the Commission determined that certain procedural and organizational changes were necessary with regard to the activities as well as the agreements of the ratemaking organizations previously approved under section 5a of the Interstate Commerce Act. The ultimate conclusions and findings of the report are reproduced in appendix A. Although most of the parties participating in this proceeding indicated general support for the Commission's decision, various parties seek reconsideraion and/or clarification of certain conclusions and findings. Replies have been filed.[1] In addition, petitions for leave to intervene were filed by Radcliff Materials jointly with Oyster Shell Products and S I Line Company, and by the Southern Traffic League. A petition to late-file a supplemental petition for reconsideration was filed by Central & Southern Motor Freight Tariff Association, Incorporated. The Household Goods Forwarders Bureau seeks waiver of the Commission's Rules of Practice and permission to file a petition requesting clarification of the status of freight forwarders under finding 11. These petitions for leave to intervene, for clarification, and to late-file are hereby granted, and the accompanying statements will be accorded consideration.

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[1] Petitioners and replicants are listed in appendix B.

Upon consideration of the matters raised on petition, said petitions for reconsideration and/or clarification are hereby granted to the extent shown in this report. All other petitions and requests not specifically referred to herein have been considered and found without merit and are hereby denied. For ease of discussion, the assailed findings will be considered in numerical order.

Preliminary to reconsideration of the findings in the prior report, two matters require discussion. The Rocky Mountain Motor Tariff Bureau, Inc., alleges that the Commission has not provided adequate notice of the proposed rules in accordance with the standards for rulemaking prescribed in the Administrative Procedure Act and section 5a of the Interstate Commerce Act. In reply, the Bureau of Enforcement states that this proceeding is not rulemaking, but one of factfinding, and that all parties have been afforded the opportunity to review the evidence and submit their statements and replies, as well as petitions for reconsideration of the prior findings.[2]

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[2] We note that the proposed Railroad Revitalization and Regulatory Reform Act of 1975 was passed by both the Senate and House and is presently awaiting Presidential action. This legislation, however, will have a significant impact upon only finding of this report relating to voting on single-line proposals.

Based on the record herein, we concluded that antitrust immunity shall continue to be extended to all agreements which allow discussion and voting on single-line proposals. There were no petitions for reconsideration filed in opposition to that finding. The proposed legislation would create a new section 5b applicable only to common carriers regulated under part I of the Interstate Commerce Act. Under the proposed new section, our findings would be negated to the extent that rail carrier members of rate bureaus would be prohibited from voting on single-line proposals, except for general rate increases or decreases, with specified notice to the public, or broad tariff changes of general application. The carriers would, however, be allowed to collectively discuss such rates when they are involved with other proposals as discussed in our original report.

The pending legislation will of course take precedence over this report and order. However, the changes that will be required if it becomes law can be easily implemented and do not necessitate revision of our prior report or this report on reconsideration. A subsequent order will be entered implementing the legislation. At that time, it will be determined whether a stay of the compliance date herein is necessary, insofar as the railroads are concerned, so that amendments required by the legislation can be filed contemporaneously with those required by our findings in this proceeding.

The petitioner's allegation is without merit. It ignores the fact that this proceeding has been conducted as an investigation into the activities of rate bureaus to determine whether agreements previously approved should be amended to conform to the standards of section 5a. Although this is not a rulemaking proceeding, adequate notice has been afforded the parties of record at all stages of the investigation. Pursuant to section 5a(8) of the act, reasonable opportunity for hearing was provided. Additionally, it should be noted that the substance of our findings in the prior report was included in the 28 areas of inquiry duly published in the Federal Register. Moreover, all parties were encouraged to participate and in fact more than 240 detailed statements and replies were filed by carrier rate bureaus, individual carriers, shippers, State regulatory bodies, governmental entities and individuals. In these circumstances, we conclude that adequate notice of the objectives of this proceeding was provided the parties and that there is no merit to the contention of petitioner.

Central & Southern Motor Freight Tariff Association, Inc., and other petitioners suggest that, rather than amend the existing approved agreements, the Commission should publish such findings as rules in the Code of Federal Regulations. We do not agree. The suggested code publication might be helpful in the future to new carrier groups in drafting ratemaking agreements for initial section 5a approval. Publication in the Code of Federal Regulations, however, is not a substitute for incorporating in the agreement itself all the terms and conditions including those which are required as a result of our decision in this proceeding. Amendment of the agreement will eliminate controversy concerning the rights, duties, and obligations between and among the carrier members and those charged with the management, conduct, and administration of the rate bureau. It will also permit the Commission to determine whether there is compliance with its findings in this proceeding. We conclude that sufficient justification has not been shown to obviate the necessity for amending the existing approved agreements.

Findings: 1. Rate bureaus assist the making of appropriate rates.

2. Procedural changes would foster actions more favorable to bureau members, shippers, and the general public.

3. The right of independent action does not adversely affect the rate structure.

These findings were protested by only one group of petitioners, the Asphalt Roofing Manufacturers Association, et al.[3] This group of shippers suggests that the preliminary questions posed should have been answered "we don't know" because of the lack of a proper data base and ask that finding 1 be withdrawn. They also request that uniform rate bureau procedures be established to protect the shippers' right to be heard.

This position is opposed by various motor carrier rate bureaus which object to the attempt by petitioners to raise once again the issue of uniformity, and all parties are reminded that there was almost total unanimity that rate bureaus do assist in the making of appropriate rates. Accordingly, replicants ask that the petition for reconsideration of the first three findings be denied as repetitious and without merit. We agree.

Judgments in these preliminary areas of inquiry are subjective in nature. Accordingly, the terms "data" and "data base" must be approached in the context of an investigative proceeding such as this. Unsupported demands for a greater "data base" at this late stage are not a proper basis for reconsideration of the entire investigation. Nothing is included in the request that has not been previously submitted, considered, and rejected.

The Commission has concluded on the record before it that rate bureaus serve a useful function in ratemaking. Petitioners' arguments seeking reconsideration of finding 1 are denied.

Similarly, reconsideration of findings 2 and 3 is also denied. Once again, the arguments are repetitive. At page 818 of the prior report, the question of uniformity of procedures is discussed and rejected as "counterproductive."

Findings: 4. A system need not be established by the Commission to monitor public hearings before rate bureaus, but that formal minutes, and not verbatim transcripts, are required of rate committee proceedings.

5. Commission representatives may attend all rate bureau meetings: but that copies of correspondence and documents concerning all rate bureau meetings need not be filed with the Commission.

6. A uniform system of accounts for rate bureaus will be promulgated.

No party requests reconsideration of these findings. They are supported by the record in this proceeding and are hereby affirmed.

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[3] This petition was filed jointly by Asphalt Roofing Manufacturers Association; Builders Hardware Manufacturers Association; National Associaton of Electrical Distributors; Pencil Makers Association; and Steel Office Furniture Traffic Association, hereinafter referred to as the Asphalt Roofing Group.

Finding 7: Rate bureaus are not prohibited from furnishing technical and professional services to other bureaus or nonmembers provided that the limitations expressed in the report are observed.

Southern Motor Carriers Rate Conference requests clarification of finding 7 concerning the type of services one rate bureau may furnish other bureaus and those activities prohibited by the decision.

The underlying justification for permitting one bureau to furnish services to another or to individual nonmember carriers is efficiency and economy of bureau operation. It is not a question of whether a bureau may expand its activities by providing services to nonmembers, but whether, with its present staff and facilities, it can operate with greater efficiency and economy in providing such services to the benefit of its member carriers.

Bearing the foregoing in mind, any attempt to provide a complete and exhaustive list of services one bureau may or may not perform for another rate bureau or other nonmember is not practical. Such action could deprive an individual rate bureau of its managerial discretion toward efficiency and economy of operation. As discussed in the report, carrier groups, in providing services to other rate bureaus, are to refrain from any semblance of *de facto* merger or control without Commission approval. The permissible service activities must be restricted to those which do not integrate the operations of two separate carrier groups as the earlier field investigations uncovered (see page 822 of the report). The publication of tariffs is a ministerial function of a bureau in which the service is similar to that of a printer. On the other hand, the furnishing of personnel, use of space and facilites, or the collection of dues and fees for another bureau is a different matter, involving a degree of control over the operations of such other bureau and in which the provisions of the respective section 5a agreements approved by the Commission are ignored.

The rationale of the prior report, which we here affirm, is to permit only those services to be provided by one rate bureau for another that do not constitute the exercise of control.

Finding 8: Rate bureaus may not invest in another commercial business, whether related or unrelated to its primary function of processing and publishing rates and related matters for member carriers.

In our prior report, we concluded that the above prohibition should be imposed. However, we did cite as an example that bureaus may invest in Government bonds or the like to build a reserve for future years.

The rate bureau petitioners appear to agree with our conclusion that they may not receive antitrust immunity under section 5a to make commercial investments but maintain that for this reason we may only be concerned with the collective ratemaking aspects of a bureau and may not prohibit it from investing in commercial enterprises. The investment of funds is said to be controlled not by the agreement but by the corporate charter and by-laws over which the Commission has no control. They also argue that carriers are free to spend or invest their funds as they choose and, thus, may do so through the bureaus. It is urged that the Commission may not control indirectly what it cannot control directly.

Shipping interests repeat earlier arguments that the public should not be forced to bear the ultimate costs of unsuccessful ventures by rate bureaus in areas unrelated to their primary functions. They argue that, since an agreement may be approved only when it accords with the national transportation policy, the Commission should ban commercial ventures which have a significant chance for loss, divert capital from investment in carrier facilities, require substantial time for a bureau to manage or operate, or could be preferred by the carriers to the detriment of shippers competing with those businesses. The Commission's Bureau of Enforcement and other petitioners recommend that rate bureau be held to the same standard of conduct required of a trustee when he invests. It is feared that without such a restriction, rate bureaus might amass sizable funds and act independently of their member carriers.

By this prohibition, we do not dicate what investments carriers are or are not to make but merely find how approved rate bureaus should use their member carriers' money. Thus, the petitioners' argument concerning illegal, indirect control is irrelevant. Section 5a of the act authorizes the Commission to prescribe terms and conditions for our approval of an agreement which are necessary to enable it to meet the standards contained in that section which are, in part, that the national transportation policy will be furthered. That policy includes the fostering of sound economic conditions in transportation and among the carriers. We remain convinced that commercial investment by ratemaking organizations is inconsistent with this policy and should be prohibited.

In our opinion, a rate bureau is not a sound, efficient vehicle for carrier investment in commercial enterprises. Since they are organized to publish tariffs and to perform other "housekeeping" duties, it does not necessarily follow that they are properly organized to investigate fully any possible investments or to decide correctly how much of the members' money should be risked. As noted in the prior report, one such ill-advised venture lost money for the carriers. We are also concerned that a bureau may be more attentive to its business investments, especially when successful, than to its duties to its member carriers, which we cannot permit. This presents a potential conflict of interest by the bureau which we also found objectionable in considering whether rate bureaus should be profitmaking and when considering the role of shipper-affiliated carriers.. Furthermore, petitioners do not deny that the need to recoup any financial losses could result in higher rates for the shipping public. It is proper for the Commission to preclude these dangers by retaining this condition for our continued approval of section 5a agreements.

However, some of the petitions have convinced us that we should clarify to some degree what investments other than Government bonds will be permitted. We believe that the national transportation policy will be best served by restricting rate bureau investments to those in which the risk of loss is minimized. In accord with the bureaus' nature as an agent for the member carriers, its use of their money should be held to a strict standard of conduct. Thus, we accept the recommendation of several petitioners and conclude that rate bureaus may invest surplus funds which are to be held for contingencies in bureau operations. These funds may only be placed in investments which the State of the bureau's incorporation or, if unincorporated, of the principal place of business permits for trust funds, provided that the State would allow such investments to be made by a nonprofit organization. This standard should minimize the problems of interpretation by referring questions of what is an appropriate investment to established State law. A bureau may also apply directly to the Commission for approval of any other specific investment which it believes will adequately protect its member carriers' funds. The bureaus will be subject to periodic audit to verify that they are in compliance.

Several petitioners ask us to approve specific kinds of investment. Upon consideration of these requests, we conclude that the following will provide sufficient security so that a rate bureau may: deposit funds with trust departments of banks for investment in federally insured savings and loan institutions or in treasury bonds; purchase certificates of deposit from financial institutions; invest in State or local bond issues, commercial paper or banker's acceptances; and own its building and rent space in it if not in violation of finding 7 previously discussed. One petitioner asks if our restriction applies to pension plans for bureau employees: it does not.

In summary, we conclude and find that no cause has been shown for removing this prohibition against commercial investment by rate bureaus. Furthermore, we conclude and find that the standard explained above will further the national transportation policy. Insofar as these petitions seek that this finding be changed, they are denied.

Finding 9: Rate bureaus are prohibited from acquiring other rate bureaus without prior Commission approval.

No petitioner challenges finding 9; it is hereby affirmed.

Finding 10: Rate bureaus may not be profitmaking enterprises.

Two petitioners,[4] both profitmaking rate bureaus, request reconsideration on the grounds that there is no reasonable construction under the language embodied in section 5a that denotes any restriction against a profitmaking entity. According to petitioners, there is no evidence of record to support the finding that ratemaking organizations may become subservient to strong outside elements as some participants have alleged. In reply, the National Industrial Traffic League and the Commission's Bureau of Enforcement submit that the Commission properly concluded that rate bureaus may not be profitmaking enterprises.

We are of the opinion that insufficient arguments have been presented to warrant a change in our finding. It is undenied by petitioners that antitrust immunity under section 5a should not be used to generate profits, but they argue that profitmaking should not be prohibited because it does not conflict with the standards of the statute. We disagree. It has been consistently held that, under section 5a(2) as well as under the national transportation policy, a rate bureau is to serve its member carriers who retain complete control over ratemaking. See *e.g. Intercoastal S. S. Freight Assn.—Agreement*, 297 I.C.C. 759, 761; *Rocky Mountain Motor Tariff Bureau, Inc.—Agreement*, 293 I.C.C. 585, 591. We have concluded in this proceeding that a rate bureau's service function is inconsistent with, and threatened by, its entrepreneurial activities.

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[4] Carriers affiliated with one petitioner, Motor Carriers Tariff Bureau, Inc., have not been granted section 5a approval because of agreement deficiencies. Since 1954, four separate applications have been denied. A petition for reconsideration is pending to the denial of a fifth application by decision and order of Review Board No. 4, dated August 22, 1975, under docket Section 5a Application No. 108.

The petitioners' arguments do not convince us that our fears are unjustified. The fact that the Commission has not objected in the past to a profitmaking organizational structure is not a bar under section 5a(7) to our now promulgating a change. As stated in our prior report, "*** the spirit of section 5a, with its unique antitrust immunity, was never intended to generate profits, and in our opinion, conflicts with the bureaus' service function." The fact that a bureau may have acted for years without any allegation of misuse of its authority is no guarantee that future personnel would continue this exemplary policy. The request by a petitioner that this prohibition apply only prospectively is denied. If an organization approved under section 5a has the potential for abuse, as it does if it is profitmaking, it must be changed or the antitrust immunity of the member carriers should be removed. The degree of inconvenience involved in changing the organization is not relevant to the merits. We conclude that the petitions for reconsideration lack merit and are denied.

Finding 11: A carrier member of a bureau, which carrier is affiliated in any way with a shipper, may not serve on a bureau's board of directors, general rate committee, or any other committee which has an effect, either directly or indirectly, on the ratemaking function of the bureau without specific prior Commission approval.

Several petitions seek either reconsideration or clarification of this finding. Those parties, generally the motor rate bureaus, which request reconsideration argue that this finding is based solely upon conjecture with no documented evidence of undue influence. They feel that our prohibition is arbitrary and capricious and has the practical effect of assigning shipper-affiliated carrier to "second class citizen" status by effectively removing some of the country's leading carriers from participation in the collective ratemaking function. It is argued that it is not feasible for a shipper-affiliated carrier, however ill motivated, to dictate bureau action on any given rate proposal and that any attempt to write a regulation to cope with a conflict of interest is not practical and doomed to failure. Other attacks upon our finding were expressed in only the most general terms and foresee the collapse of the present ratemaking scheme.

Other parties accept the prohibition but request clarification regarding a definitive definition of the term "shipper-affiliated carrier" and the status of freight forwarders for the purposes of this proceeding. Others seek clarification out of a concern that the prohibition will drastically limit the number of persons eligible to serve on rate bureaus' committees.

We have carefully reviewed the petitions and replies and find that a change in the prohibition expressed in this finding is not warranted upon the arguments presented. However, our conclusion is not based upon mere conjecture as alleged. This proceeding was initiated following extensive field investigations into the operations of rate bureaus and of some of their member carriers which yielded a grant amount of information. Included in the reports of those investigations were voluminous financial, organization, and proposal studies which were compiled and opened for public inspection well before the receipt of initial statements. Those investigation reports set forth several clear instances of questionable practices of shipper-affiliated carriers which carried over into ratemaking committee deliberations and had a direct effect upon the collective consideration of the level of rates in that territory. In our initial report we felt it unwise and untimely to charge any particular party with a specific violation but did clearly state our policy at page 829 as follows:

> As previously mentioned, we charge no carrier, shipper, or ratemaking organizations with any overt improprieties in this regard. In our view, however, it is important to eliminate even the appearance or possibility of malfeasance, misfeasance, undue influence or conflict from the function of those organizations sanctioned under section 5a. We are convinced that such relations could cause the objectivity and fairness of even the best-intentioned carrier representatives to suffer when considering rate questions in the light of their particular shipper-affiliates' interests.

Nothing contained in the petitions warrants a change in that policy or the conclusion reached. Accordingly, there is no merit to such petitions and they are hereby denied.

Regarding the allegation that shipper-affiliated carriers would be relegated to secondary status by removal from ratemaking committees, such allegation is without foundation in fact or substance. Under collective ratemaking agreement procedures generally approved for motor carriers, the duties and obligations of ratemaking committes are to investigate and consider objectively rate proposals and to make recommendations. Any member carrier, shipper, or other interested person is accorded the right to make representations, either orally or in writing, for or against a proposal. The action of ratemaking committees, initially or on appeal, constitutes merely a recommendation to the carrier membership at large for its ultimate determination whether by vote or by the right of independent action preserved in each approved agreement

pursuant to section 5a(6) of the act. It is apparent that whether a member carrier serves on a ratemaking committee does not, in any manner, affect its other rights. It may still submit to the ratemaking committee all relevant facts and evidence in support of its position concerning a docketed proposal for committee consideration in reaching a recommended disposition on the merits. If a carrier does not agree with such recommended disposition, it may independently elect a different tariff publication for its account. The fact that a particular carrier is not represented on a ratemaking committee does not inhibit that carrier from full and complete participation in the collective ratemaking process under the standards of section 5a of the act. In the circumstances, we conclude and find that the contention raised by these petitioners is not justified, and does not warrant a change in the prior finding.

We agree with the parties that clarification in this area would be helpful, and appropriate action has already been taken. By order entered August 21, 1975, served August 25, 1975, the Commission defined the term "shipper-affiliated carrier" for the purposes of this proceeding as a common carrier which:

> (1) is wholly or partially controlled or managed by an individual, company, or other business enterprise and for whom the carrier performs transportation services; or,
> (2) wholly or partially controls or manages a company or other business enterprises for whom the carrier performs transportation services; or,
> (3) is controlled or managed in a common interest with a shipper or receiver of freight for whom the carrier performs transportation services and/or shares common facilities, however such result is attained, whether directly or indirectly by use of common directors, officers, or investment company or companies, or in any other manner whatsoever.

As used in the foregoing definitions, the phrase "controlled or managed" was further defined to include the power to exercise control or to manage. The order further set forth the specific information required of carriers in applications under verification to support Commission approval for their participation on ratemaking boards or committees of rate bureaus.

Various applications filed by shipper-affiliated carriers have misinterpreted the order and the relief accorded under section 5a by requesting approval committee service for named individual officials to represent the carrier. Under section 5a of the act and the agreements approved thereunder by the Commission, the approval and relief granted applies to the carriers, and not to individuals. In the circumstances these applications will be considered as filed for and on behalf of the particular carrier, rather than for the named individuals. No further action need be taken to amend these applications. Where separate applications have been submitted by a shipper-affiliated carrier for carrier officials, they are being consolidated for processing.

Clarification is also sought regarding the status of freight forwarders affiliated with carriers of other modes subject to the act or vice versa. Notwithstanding any other formal determination that may be outstanding regarding the definition of a freight forwarder, for the purposes of this proceeding, freight forwarders subject to part IV of the act are to be construed as common carriers insofar as their affiliations with common carriers of other modes are concerned. The rationale is that such an affiliation is one between transportation agencies, each providing common carrier service for the shipping public within the scope of their respective authority. Thus, freight forwarders or carriers affiliated with forwarders need not file applications under this finding because of such affiliation. Of course, in other circumstances in which freight forwarders are affiliated with shippers, appropriate applications must be filed for approval as a shipper-affiliated carrier.

Finding 12. A maximum period of 120 days is prescribed for the processing of proposals to final disposition.

Because of our concern about unjustified delays in ratemaking, it was prescribed that proposals should be processed to final disposition within 120 days except in instances justifying lengthier consideration, such as complex interline, interterritorial, and nationwide adjustments for which adequate records should be maintained. We also concluded that currently approved agreements must be amended to provide time limits for each stage of the collective ratemaking procedure, subject to the above maximum period and exceptions.

Several matters are raised on petition. The National Motor Freight Traffic Association, Inc., maintains that the time limit should not apply to classification changes or should start from the first day for a hearing, and some shipper interests support this position. Other shippers oppose any time limit on the grounds that a shipper often needs as long as 2 years to analyze sufficiently some complex matter as territorywide adjustments or to persuade and compromise with carriers so that its own proposal is adopted. It is urged that, with this time limit, the carriers might be inclined to vote to reject a shipper's proposal, especially an unpopular one or one made by a small shipper. It is further argued by some shipper interests that it is the carriers' decision whether or not to keep the required records justifying longer consideration and fear that they would have to petition the Commission to suspend an undesirable carriers' proposal or to refile their own if the carriers use the 120-day maximum to frustrate meaningful shipper participation.

The railroads seek to have two of their agreements pertaining to national demurrage and mileage allowances relieved from this requirement on the grounds that their proposals require special and lengthy consideration often in excess of 120 days because their committees only meet at 60-day intervals and that they do not wish to violate such a provision if it is included in their agreements. Finally, one rate bureau petitions for clarification of the definition of the "final disposition" of a proposal.

In reply, the Commission's Bureau of Enforcement notes that there will be no need to dispose summarily of proposals after 120 days since the time for consideration can be extended as long as justified and urges that it apply to all rate bureaus. This approach is consistent with the prior report.

The 120-day maximum period is intended as an adequate guideline for handling the vast majority of proposals, and the limited number of petitions on this matter confirm this opinion. The maximum is not an absolute. Several of the petitions have apparently overlooked our permission to extend the time for consideration if adequate justification exists and if records attesting that fact are kept available for inspection. As the petitions show, and as noted in the prior report, complex proposals such as nationwide changes in classification, demurrage, or mileage allowances may require study and consideration for longer than 120 days. It should be noted that no petitioner alleged that proper records could not be maintained. We are still persuaded that this maximum time period will be a useful exhortation to the carriers when processing the vast majority of proposals. Undue importance is placed upon the few exceptions to the norm by petitioners, and this should not mislead the parties.

We also believe that shipper participation in the ratemaking process will be helped, not hindered, by this provision. It was the shipper input which contributed heavily to this decision originally, and the prior report stated that the argument that such a time limitation would increase the rate of denial was not supported by the evidence. Many shippers supported the time limitation as a means of preventing inordinate delays of their proposals. For complex ratemaking proposals, we believe that 120 days allow sufficient time for the proponents to persuade enough carriers that they merit further consideration. However, we emphasize to the rate bureau member carriers that a vote at the end of 120 days to adopt or reject a complex proposal is not an absolute requirement; rather it is intended only to avoid unjustified delays in carrier processing. As previously indicated, the 120-day period may be extended, for example, when a collective ratemaking matter is actively undergoing consideration to resolve conflicting positions and reach compromise among the parties. We urge all parties to strive for cooperation in meeting this time limit for we believe that greater efficiency will be the result. Nevertheless, if abuse should occur, we will take corrective action against the bureaus involved.

Further, in our opinion, rail committee meetings to consider demurrage and mileage allowance matters at 60-day intervals as revealed by this record appear excessive and unjustifiably contribute to the undue delays of carrier action. In fact, the annual reports for year 1974 filed with this Commission by the Association of American Railroads on behalf of the member railroads concerning these matters under agreements approved in Section 5a Applications Nos. 7 and 97 disclose that a very limited number of proposals were processed under each agreement. The carriers are admonished to intensify their efforts to expedite the investigations and, where the situation requires, to make provision to hold committee meetings more frequently. We conclude that the requested blanket exemption has not been justified and is hereby denied.

Concerning the request for clarification as to when a proposal has reached final disposition, the parties are referred to the following statement at page 830 of our prior report:

> *** The term "final disposition" means adoption, rejection, or withdrawal of rate proposals, including appeal procedure, if any, so as to render such a determination administratively final within the agreement procedures. ***

We believe that this statement adequately defines the term while at the same time allowing as much latitude as possible. Since all agreements differ, it is not possible to select an all-encompassing ultimate time for final disposition, which is dependent upon the particular agreement procedures and complexity or extent of objections to a given proposal.

Consistent with the above, the request of the National Motor Freight Traffic Association that the time limit should start from the first day for a hearing is denied. If proposals considered by that bureau are of a degree of complexity that requires extended consideration, a written record of justification will permit an extension for processing beyond the 120-day period. The justification, however, must be sufficient to withstand Commission scrutiny if challenged. Any other interpretation would be inconsistent with our intent that proposals be processed as expeditiously as possible.

Accordingly, we conclude and find that sufficient cause has not been shown for striking or modifying this finding and the petitions thereto are hereby denied.

Finding 13: Public notice of proposals need not identify the proponent.

The Asphalt Roofing Group objects in part to this finding. No other party to the proceeding has requested reconsideration of finding 13. It is the position of Asphalt Roofing Group that a carrier proponent of a rate proposal should be publicly disclosed but that a shipper proponent should not be subject to a similar mandatory disclosure requirement. We cannot accept this argument. Our finding was based on evidence of record that there was a distinct possibility of shipper retaliation against an identified carrier whose proposal has been approved.

Collective ratemaking through the auspices of an approved rate bureau assures public notice of the initiation and disposition of carrier ratemaking proposals and opportunity for shippers and other interested parties to express views prior to collective determination. If a shipper believes that a proposed rate or charge, if allowed to become effective, is unlawful under the Interstate Commerce Act, it has a statutory right to protest to the Commission for suspension and investigation under section 216(g) and comparable sections under other parts of the act. Accordingly, we reaffirm our prior finding and decline to make disclosure of the identity of a proponent mandatory. As previously pointed out, some rate bureaus do disclose proponents' identity, and this practice may be continued under our decision.

Finding 14: Rate bureaus are prohibited from broadening the territorial or commodity scope of an individual rate proposal without prior adequate notice.

One shipper group seeks reconsideration on the grounds that the prohibition set forth is too inflexible because it makes no distinction between increases and reductions. It is their position that it is frequently necessary for one shipper or carrier to seek to broaden the docket in order to make a reduction which is competitive with that proposed. Such flexibility, they argue, is needed in order to take prompt action in situations where discrimination and loss of competitive position would otherwise result.

We concede that our initial report made no distinction between rate proposals for increases or reductions but spoke of "changed" or "broadened" proposals. However, whether increases or reductions are involved, the issue is the same. That issue was stated at page 833 of the report as follows:

> * * * We view this issue as one of fairness and due process. Our major concern is that all affected parties to any rate change proposal be afforded adequate public notice and an opportunity to be heard and to participate. This is central to the scheme and reasoning underlying the antitrust immunity granted to carrier members of ratemaking organizations under section 5a. * * *

We adhere to our prior determination that notice is of such overriding importance that our requirement must stand. Absent such a prohibition, commodity and/or territorial changes could be made in proposals which would affect many other interested parties without their knowledge, thus precluding their participation in the collective process caused by the broadened proposal. This we cannot allow. Such a situation would be contrary to the Commission's obligation to prevent undue discrimination in any form wherever it exists, or could exist, in the country's regulated common carrier system. Furthermore, our investigation revealed that this area does not present a serious problem since most ratemaking organizations either presently operate with similar provisions in their agreements or honor it in practice. We have not been presented with, nor have we uncovered, any additional evidence to the contrary. On balance, we are of the opinion that the prohibition is essential for shipper protection. Accordingly, the request for modification is denied.

Finding 15: Adoption of shortened special procedures involving proposals covering special docket applications are not warranted in this proceeding.

We affirm this finding which has not been challenged on petition.

Finding 16: Section 22 quotations require special bureau procedures limiting notification to members and the governmental agency.

Certain petitioners request reconsideration, modification, or clarification of this finding. Other petitioners request withdrawal of the finding on the ground that the finding would erroneously forbid collective carrier consideration of section 22 quotations. However, there is no merit to such contention for the reasons hereinafter discussed.

In justification of the requested clarification and/or modification, several rate bureau petitioners and the Department of Defense (DOD) allege that an ambiguity exists between the report and the order. According to DOD, the discussion in the report leads to the conclusion that the determination of the Commission is that rate bureaus are to have no substantive influence on the content and approval of section 22 rates, but may only act in an administrative capacity by publicizing and processing them where special collective procedures have been approved by the Commission. However, DOD argues that the order does not entirely prohibit bureaus from having a substantive role in the content, acceptance, or participation in setting collective quotations for section 22 tenders. Accordingly, it is requested that this finding be clarified.

In a reply, the General Services Administration (GSA) maintains that the Commission has properly exercised its statutory responsibility by ordering that existing approved section 5a agreements be amended to eliminate collective ratemaking of section 22 quotations.[5]

In the prior report at page 837, it was stated:

> Therefore, in the absence of approved special collective section 22 procedures, ratemaking organizations do not enjoy the antitrust immunity conferred by section 5a(9) of the act if participating in activities concerning section 22 quotations. In any event all bureaus must limit their activities to notifying member carriers of section 22 quotations and processing such filings.

However, the order stated the following:

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[5] In response to this reply, a subsequent petition was filed on behalf of Middle Atlantic Conference and Pacific Inland Tariff Bureau. This petition sought to have the GSA reply classified as a petition for reconsideration, thereby entitling petitioners to a second reply. GSA, in turn, replied to the request. The petition is hereby denied for the reason that the GSA pleading is properly classified as a reply, and a reply to a reply is not permitted under the Commission's General Rules of Practice, rule 23.

> *** That in the absence of approved special procedures, rate bureaus be, and they are hereby, limited to notifying the membership and the governmental agency involved, of a section 22 quotation adopted by a member carrier ***.

It is obvious from the foregoing that there is a variation in the language which has led to the filing of petitions for clarification. We emphasize at the outset that the discussion and finding in the prior report was not intended to forbid collective carrier consideration of section 22 quotations on Government traffic. On page 836 of the report we noted that there are instances where two or more carriers will wish to tender a quotation, and it is to this situation that the separate collective action procedures of the bureau are directed. In the circumstances, it is the ordering paragraph which correctly reflects the Commission's intent and is hereby affirmed.

As pointed out by certain rate bureau petitioners, the legislative history of section 22 clearly contemplates collective carrier consideration of section 22 quotations under section 5a antitrust immunity on traffic for the United States Government or any agency thereof. Any attempt by the Commission through this proceeding to prohibit such collective action would be contrary to the mandate of Congress when it amended the Interstate Commerce Act in 1957 to include section 22(2).[6]

Prior to the amendment of section 22(2), the United States District Court for the District of Columbia in *Aircoach Transp. Assn.* v. *Atchison, Topeka & S.F. Ry., et al.*, 154 F. Supp. 106, 107, held that section 5a did "not apply to concerted section 22 quotations to the United States Government." Effective August 31, 1957, the Congress amended section 22 to make clear that the provisions of paragraph (9) of section 5a, carrying relief from the antitrust laws, should apply on quotations or tenders of rates, fares, or charges made under section 22.

Following this amendment, the Commission has not forbidden collective carrier consideration of section 22 quotations but has required special procedures for section 22 quotations separate and distinct from regular carrier procedures on commercial traffic. Those rate bureaus whose agreements contain approved special procedures may continue to consider section 22 quotations. Those ratemaking organizations without any of the mandated special procedures may not act collectively upon section 22 quotations nor enjoy the antitrust immunity of section 5a(9). Instead, these bureaus must limit their activities in such a way that they merely assist the member carriers in the mechanics of filing and publishing such quotations. Any other activity is contrary to section 5a, the antitrust laws, and the national transportation policy. Ratemaking organizations are urged to review their own agreements to ensure that their practices are in conformity with our decision in this area. Should they determine that new procedures are necessary in connection with section 22 collective quotations, such requests may be filed along with other changes made necessary by this proceeding.

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[6] For a clear expression of congressional intent, see Conference Report No 1171 in U.S. Code Cong & Adm News, 85th Cong., 1st Sess. 1957, p. 1789.

> Finding 17: Docketing of rate bureau proceedings with respect to general rate increase proposals need not be mandatory.

The Asphalt Roofing Group and the Drug and Toilet Preparation Traffic Conference, et al., seek reconsideration of this finding. These shipper organizations urge that the docketing of general rate increase proposals should be made mandatory and subject to public hearings prior to filing such increases with the Commission since such proposals are extremely important. It is argued that shippers need maximum notice of upcoming increases especially because some general increases may favor one section of the country as compared with another, or provide for an increase on one commodity and no increase on another competitive commodity.

In support of this position, the Drug and Toilet Preparation Traffic Conference argues that in rail general increases the Commission must deal *ab initio* with objections of shippers which should have been resolved at public hearings and generally attacks the procedures employed by the Commission. Conversely, it is stated that the current motor carrier practice of docketing general increases has not resulted in undue delay and should be extended to the rail rate bureaus. Another argument put forward in support of reconsideration is that section 5a *requires* that docket notice be given of all rate proposals because, without notice, the free and unrestrained right to take independent action either before or after any determination arrived at through collective procedures is absent.

In reply, the western railroads take issue with the contentions of Asphalt Roofers, et al., that there is insufficient notice of rail general increases. The railroads assert that the recently enlarged provisions in Ex Parte No. 286, *Notice of Increases in Frt. Rates and Pass. Fares*, 349 I.C.C. 741, among others, ensure that the shipping public is made fully aware of pending general increases well in advance of filing with this Commission. Moreover, it is argued that the Commission consistently allows the shipping public ample time after filing for the submission of protests. They dispute the allegation that "no significant attention" is paid to individual shipper protests and/or opposition.

Objection is also taken by the western railroads to the assertion that members' right of independent action is abridged under the present handling of general increase proposals. The railroads allege that this is new matter—raised for the first time in a petition for reconsideration—and unsupported by factual evidence. The assumption that rail carriers cannot take timely independent action is incorrect, according to replicants, because members of a rate bureau must, and do, meet to discuss and prepare the proposals and meet with their counterparts in eastern and southern territory. Thus, member carriers have notice of pending proposals and the opportunity to take independent action. Finally, the railroads call attention to the fact that only two shipper groups seek reconsideration of this finding and urged that their petitions be denied.

We agree with replicants that petitioners have not established sufficient grounds for reversing our prior findings. In support of our prior findings, we noted that special procedures designed to protect the public govern the filing of rail general increase proposals. Further special procedures are under consideration in Ex Parte No. 290, Procedures Governing Rail Carrier General Increase Proceedings. The allegation of lack of opportunity for independent action is not supported by fact. We note that individual railroads have declined to participate, in whole or in part, in all recent general increases. In the circumstances, we conclude that a uniform docketing requirement should not be imposed at this time. This decision we leave to the discretion of the individual carrier rate bureau members "with the admonition that we will continue to monitor this area as well, and that our authority under section 5a permits us to change our position should future events warrant."

Finding 18: The Commission need not obtain and publish reports of the deliberations within the industry concerning the matter of general increases.

Finding 19: The various rate bureaus need not join in seeking general rate increases.

Finding 20: The various rail rate bureaus are not required to substantiate general increases on a regional basis only, but that regional costs should be presented in a more explicit manner.

No exception was taken to any of the above findings. They are supported by the evidence in this proceeding and are hereby affirmed.

Finding 21: Rate bureaus are prohibited entirely from protesting proposals of carrier members, and are not merely limited to instances in which the proposed rate is less than long-term variable cost or other specific instance.

Most of the major motor carrier rate bureaus and various individual member motor carriers petition for reconsideration and recision of this finding. Shippers and major shipper groups, on the other hand, uniformly support the Commission's decision. One shipper group seeks extension of the prohibition to protests against nonmember rate publications.

In support of recision, the rate bureau petitioners maintain that (1) the Commission does not have the authority to prohibit bureau protests of carrier member proposals; (2) such protests are needed to prevent irreparable harm to the carrier rate structure; and (3) the prohibition is arbitrary and capricious.

The principal argument advanced by the rate bureau petitioners in support of the bureaus' right to protest is that the right of the cariers to engage in collective ratemaking under immunity of the antitrust laws pursuant to section 5a and the right of any person, including rate bureaus, to make a complaint under section 216(e), are separate and distinguishable. According to these petitioners, the Commission cannot require carriers to relinquish their right to protest through their bureaus as part of the price for antitrust immunity for collective ratemaking. They take the position that the Commission can only grant or deny such relief. In further support, it is argued that section 5a did not bring rate bureaus into existence.

It is further argued, assuming *arguendo* that the Commission has authority to prohibit rate bureaus from protesting member carrier independent action, that the Commission should not do so because the bureaus exercise their right to protest responsibly. It is alleged that such prohibition would severely cripple the ability of the Commission to discharge its responsibility to see that rates are lawful. The individual motor carrier bureau members supporting protests by their rate bureaus allege that it is more economical and efficient for the bureau to enter a protest because the individual carriers lack adequate personnel with the expertise to enter protests. Additionally, the petitioners stress the low incidence of bureau protests to support their claim that bureau protests do not stifle competition.

Central & Southern Motor Freight Tariff Association, Inc. (C&S), in its supplemental petition, which we here consider, cites 11 independent action publications by 10 different member carriers in the short period following the issuance of the prior report to which it would have filed protests in the absence of the prohibition. It argues that bureau protest to maintain a reasonable rate structure is not harassment by rate bureaus, but precludes destructive competitive practices and the establishment of unreasonably low rates caused primarily by intimidation of individual carriers by powerful shippers. It is alleged that shippers have the power to exercise economic retribution against individual carriers who protest independent action publications made by another competing bureau member carrier.

The American Retail Federation defends the Commission's authority to impose the considered condition. It points out, and we agree, that the legal authorities cited by petitioners are not related either to the section 5a statutory collective ratemaking exemption from the antitrust laws or the right of carrier independent action. The right of access to agencies and courts referred to in cases such as *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, does not extend to abuses of the administrative or judicial process. As the *California* case, *supra*, makes it clear, protests by rate bureaus are not "political expressions" wholly immune from the antitrust laws by judicial construction of the first amendment to the Constitution.

American Retail Federation also maintains that the petitions of the individual carriers supporting rate bureau protests indicate that the roles of principals and agent have become reversed in that the agent bureau staff, not the carrier member principals, decides when to protest a publication of a member carrier's proposed independent action. In support, replicant cites the position of C&S as revealing a very extensive and persistent effort by that bureau to use the right of protest to maintain a predetermined territorial rate level among its member carriers.

Other shipper replicants allege that the threat of rate bureau protests confirms that they deter independent actions, that the proponent and protestant of an independent rate action should be relative equals in strength, that the Commission can determine unduly low rates without rate bureau assistance, and that individual carriers should defend their own economic interests. The shipper interests and the Commission's Bureau of Enforcement point out that bureau member carriers may still protest either individually or as a group on their own behalf.

Upon reconsideration of this entire area of inquiry, we remain convinced that finding 21 of the prior report should be affirmed. We realize that this finding overturns earlier Commission decisions, such as *Middle Atlantic Conference--Agreement*, 283 I.C.C. 683, 689-690. See also *Central States Motor Common Carriers—Agreement*, 299 I.C.C. 773, 777; and majority report in *Arbet Truck Lines, Inc.* v. *Central States Motor Freight*, 321 I.C.C. 460, 463-466. Upon reevaluation of the entire matter on the record before us, and in the light of our greater knowledge and experiernce in administering section 5a, we found in the prior report that the reasoning of those decisions is incorrect and must be reversed.[7] For the reasons enunciated below, we conclude that our decision prohibiting rate bureau protests of member carriers' independent actions is a necessary and proper function of this Commission under the section 5a statute.

Paragraph (2) of section 5a confers upon the Commission authority to grant approval of carrier (not bureau) agreements "only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph." The standard set forth in paragraph (2) requires that the approval not be prohibited by other provisions of section 5a and that the agreement be in furtherance of the national transportation policy. Paragraph (7) of section 5a further authorizes the Commission to investigate and determine whether any previously approved agreement is in conformity with the standard of paragraph (2). It is apparent that the Commission, in administering section 5a of the act, has the authority to impose conditions and prescribe standards for carrying out the mandate of the statute.

In order to prevent any threat to the free and unrestrained right of carrier independent action, the public interest and furtherance of the national transportation policy require that we condition our approval of an agreement against bureau protests of members' independent action proposals.

We cannot emphasize too strongly that the right of a carrier member of a ratemaking bureau to take independent action before or after the collective ratemaking process is absolute under section 5a(6) of the act. This means that, contrary to the petitioners'

Clearly we have the authority to reverse past decisions of this Commisson when we have sound easons to do so. See *American Trucking* v. *A. T. & S. F. R. Co.*, 387 U.S. 397 (1967), and *Atchison, Topeka & Santa Fe R. Co.* v. *Wichita Board of Trade*, 412 U.S. 900 (1973).

arguments, we must not only inquire whether a bureau's procedures protect the carrier's right of independent action but also examine how practices by the agent bureau affect the exercise of that right. Furthermore, this examination cannot be limited to determining whether the bureau intends to restrict the independence of its carrier members, for the statute does not provide that only intentional infringement of a carrier's freedom is to be banned. If a practice restricts or tends to restrict the right of carrier independent action, the statute requires that it be prohibited. On this record, we have become convinced that bureau protests are a deterrent to individual member carriers' free and unrestrained right of independent action.

We disagree with petitioners' allegations that approved section 5a rate bureaus have a statutory right to protect independent action proposals which the Commission may not infringe. Petitioners disregard the fact that the enactment of section 5a of the act was an accommodation between two conflicting policies the antitrust laws and collective ratemaking practices. (See the legislative history of section 5a, House Report 1100, 80th Cong., 1st Sess., at p. 12 and the detailed discussion thereof in *Western Traffic Assn.—Agreement*, 276 I.C.C. 183, 185.) In the statutory accommodations of both policies, carriers were placed in a unique position of being able to engage in collective ratemaking exempt from the antitrust laws so long as their actions were taken in accordance with section 5a. This exemption from the antitrust laws must be strictly construed in order to make certain that carrier competition remains viable. Abuses such as instances shown on this record where it is apparent that rate bureaus and not their members determined what rates were to be maintained by member carriers can no longer be sanctioned. The protests by the rate bureaus of independent action proposals does inhibit competition. The Commission has pointed out "*** that the failure of some bureaus operating under section 5a agreements to submit supporting evidence after having protested rate proposals tends to deprive an individual carrier of its right of independent action, guaranteed by paragraph 6 of section 5a of the Act." *Junk from Davenport, Iowa, to Chicago*, 302 I.C.C. 39, 40; *Feed from Kansas City, Mo., to Indianapolis, Ind.*, 304 I.C.C. 411. We take official notice of the fact that since our prohibition became effective on July 15, 1975, there has been a substantial increase in the publication of independent action proposals and a decrease in the number of protests filed. The general language of section 216(e) of the act, relied upon by motor

rate bureaus as conferring a right to protest member carrier independent action, cannot be used to defeat the authority of the Commission to condition its approval or continued approval of carrier ratemaking agreements to achieve the express statutory standards of section 5a(2) and the prohibition of section 5a(6) of the act.

As the Commission explained in *Eastern Railroads—Agreements*, 277 I.C.C. 279, 287: "Section 5a is permissive only and it is optional with carriers to apply or not to apply for relief as to the making and carrying out of an agreement as to joint action coming within the scope of that section." However, if carrier groups seek the protection of section 5a, they must be prepared to accept such conditions as the Commission may prescribe for approval of the carrier agreements to comport with the statutory standards of section 5a. While a rate bureau seeking continued approval of its agreement under section 5a is by our decision, here affirmed, prohibited from protesting independent action proposals, member carriers are still able to protest those proposals individually or jointly, so long as the joint action does not constitute an "attempt to interfere directly with the business relationships of a competition." See *California Motor Transport Co.* v. *Trucking Unlimited, supra.*

The authority to initiate protests rests with the member carriers themselves, not the bureau. Several individual carriers assert they do not have the personnel and resources at hand to develop traffic and cost data within the time available for filing protests and seek the continued participation of rate bureaus in this process. Although we are cognizant of the role played by rate bureaus in providing many transportation related services for their member carriers, such as continuing traffic studies of carrier operations as well as compilations and analyses of carrier costs for performing transportation, we have concluded that the bureaus' role must be limited if the right of independent action is to remain absolute and viable. Fairness dictates that the data compiled and maintained by rate bureaus should be equally available to all member carriers, proponents and protestants alike. Thus, our decision will permit the furnishing of data to any member carrier upon specific request. Parties are advised that the furnishing of data by rate bureaus does not in any manner limit our prior holding that any attempt by rate bureaus "to continue the same practice with the charade of a change of name of protestant only or any other device" will not be tolerated.

Contrary to suggestions made by petitioning rate bureaus, it is the Commission and not the rate bureau that has the statutory duty to make certain that the rate structure is lawful in all respects. Petitioners' fears that the curtailment of their "policing" activities will result in the proliferation of below-cost rates are misplaced. The Commission in the exercise of its tariff supervision has established a Consumer to bring to its attention nonprotested proposals which may require action on the Commission's own motion. This unit is being expanded to provide greater surveillance in connection with unreasonable rate filings. Again we emphasize that, whatever the advantages of rate bureau protests, they must yield to the mandate of section 5a that a carrier's right of independent action be free and unrestrained.

Several petitioners ask for clarification whether rate bureaus are to be permitted to protest a member carrier's proposal which is filed in a tariff other than that of the bureau. These petitioners are of the view that publication in an individual carrier tariff is not "independent action." Some support for this position may be found in *Notice of Independent Action,* 332 I.C.C. 22. The manner of tariff publication may not necessarily be conclusive since we are concerned with substance rather than form. Nevertheless, at this time, we deem it advisable to limit the prohibition in finding 21 to tariff publications made by the rate bureau. A contrary holding would require a determination at the suspension level with limited information whether or not the proposal published in an individual carrier tariff is within the scope of the 5a agreement to which such carrier is a party. The practical problems we foresee in monitoring individual carrier tariff publications have convinced us that such publications should not be encompassed in our finding without further study. The Commission has recently established a section 5a unit to maintain continuing responsibility for evlauating and reviewing rate bureau agreements and activities. We hereby direct that section to immediately commence an indepth study and submit recommendations to the Commission on the matter.

As indicated, one shipper group seeks extension of the prohibition to protests against nonmember publications. It is our view that the record does not support an extension of this nature.

Other petitioners susggest that the Commission establish new procedures which would, among other things, protect the identity of a protesting carrier to avoid shipper retaliation. We are not convinced on this record of the necessity of such action, nor does it appear to be within the scope of this investigation into the activities of ratemaking organizations.

In conclusion, we find that finding 21, as clarified, prohibiting rate bureaus from protesting independent actions of member carriers should be affirmed for the reasons hereinabove stated.

Finding 22: Rate bureaus are prohibited from discouraging independent action proposals of member carriers in any way, including the protesting of the filing of any rates pursuant to such action.

The petitions of the motor rate bureaus and individual member carriers repeat several of the arguments raised in respect to finding 21 which have been disposed of above. Replies by shipping interests emphasize our insistence in past proceedings that the right to independent action be completely free and unrestrained. One group of shippers charges that independent actions are deterred by rate bureaus which schedule cancellation of independently established rates in bureau tariffs unless the carrier defends them at the next meeting. It is urged that such a practice be prohibited. One bureau replies that collective action on matters established through independent action does not violate section 5a(6) if the carrier receives notice of the agency action and has the opportunity to take independent action from it.

As emphatically stated above, section 5a(6) clearly requires that independent action must be free and unrestrained; this discussion need not be repeated here. The practice described by the shipper group constitutes harassment of the independent action carrier and tends to deter the initiation of independent actions. Such practice shall cease immediately or the Commission will take corrective action which could result in termination of our approval of the section 5a agreement.

In summary, the petitions for reconsideration do not justify a finding different from that reached in the prior report and they are denied.

Finding 23: Rate bureaus should be prohibited from discouraging members from publishing individual tariffs. No petitioner took exception to this finding; it is hereby affirmed.

Finding 24: Immunity from antitrust laws shall be continued.

We concluded in the prior report that the procedural and organizational changes in approved agreements and our authority to investigate a rate bureau's operation will better achieve the goals of the national transportation policy and effective regulation than would removal or curtailment of our section 5a authority.

The Asphalt Roofing shipper group alone argues on petition that antitrust immunity is unnecessary because carriers are able to price their own services without collective action or any assistance from rate bureau staffs. They emphasize that tariff publication and the distribution of data among carriers do not violate antitrust laws. It is alleged that the report ignored the possible anticompetitive effects of rate bureau activity.

In reply, one bureau correctly notes that petitions of other shippers do not challenge this finding and submits that the record in this proceeding overwhelmingly supports the conclusion.

The contribution of rate bureaus is more than the collective publication and distribution of transportation data. They also provide the forum for the initiation and joint consideration by the carriers of rate matters with an opportunity for shippers and other interested parties to be heard prior to carrier action. The Commission, at the outset of considering section 5a applications for agreement approval, stated: "Only in this way can adjustments of rates to changing conditions and the needs of carriers and shippers be considered with the degree of promptness, the intimate knowledge of conditions, and the opportunity for useful compromises, that are needed to promote the commerce of the country." *Western Traffic Assn.—Agreement, supra,* at page 213. This statement is equally applicable today under current conditions.

We conclude that sufficient justification has not been shown to warrant a different finding.

Finding 25: Immunity from the antitrust laws shall continue to be extended to agreements with respect to proposals of single-line movements.

Finding 26: Additional legislation is not necessary, and need not be sought, to better effect the goals for which section 5a was enacted.

Modification or reconsideration of the above findings is not sought by the parties. Findings 25 and 26 are affirmed.

Upon consideration of the entire record in this proceeding, including the prior report and order and the petitions and replies thereto, we conclude and find on reconsideration, that the findings in the prior report and order, as hereinbefore discussed and clarified, should be affirmed.

By order of November 3, 1975, the Commission, pending disposition of the petition for reconsideration, stayed until further

order the compliance date for the filing of amendments to approved agreements implementing the requirements, standards, and findings set forth in the prior report and order. The compliance date will be reinstated 90 days from the date of service of this report and order on reconsideration so as to permit the signatory carriers to approved agreements sufficient time to file appropriate amendments to their respective agreements consistent with the findings in this proceeding.

Commissioner Gresham, concurring in part:

Upon reconsideration, I continue to disagree with findings 13 and 17 made by the majority in response to questions 14 and 18 respectively, based upon the same reasoning as was set forth in my separate expression in the prior report in this proceeding, appearing at 349 I.C.C. 853-855.

Commissioner Brown, whom Commissioner O'Neal joins, dissenting in part:

I continue to be of the view that public notice of proposals should identify the proponent carrier and the proponent shipper, if there is one.

In all other respects, I am in complete accord with this report on reconsideration.

Commissioner Corber, dissenting in part:

I continue to dissent to finding 14, insofar as it requires redocketing whenever the territorial or commodity scope of an individual rate proposal is broadened, for the reasons set forth in my partial dissent to the prior report in this proceeding, 349 I.C.C. 811, 855-56 (1975).

Commissioner MacFarland did not participate.

It is ordered, That the findings in the prior report and order in this proceeding, 349 I.C.C. 811, be, and they are hereby, affirmed subject to the clarifications hereinbefore discussed in this report on reconsideration.

It is further ordered, That member carriers of rate bureaus be, and they are hereby, required to file appropriate amendments to their respective agreements consistent with the requirements, standards, and findings set forth in the prior report, as clarified in this report on reconsideration, within 90 days of the date of service of this report and order.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX A

Ultimate conclusions and findings of prior report, 349 I.C.C. 811

1. Rate bureaus assist the making of appropriate rates.

2. Procedural changes would foster actions more favorable to bureau members, shippers, and the general public; such changes being contained in the body of the report.

3. The right of independent action does not adversely affect the rate structure.

4. A system need not be established by the Commission to monitor public hearings before rate bureaus, but that formal minutes, and not verbatim transcripts, are required of rate committee proceedings.

5. Commission representatives may attend all rate bureau meetings; but that copies of correspondence and documents concerning all rate bureau meetings need not be filed with the Commission.

6. A uniform system of accounts for rate bureaus will be promulgated.

7. Rate bureaus are not prohibited from furnishing technical and professional services to other bureaus or nonmembers provided that the limitations expressed in the report are observed.

8. Rate bureaus may not invest in another commercial business, whether related or unrelated to its primary function of processing and publishing rates and related matters for member carriers.

9. Rate bureaus are prohibited from acquiring other rate bureaus without prior Commission approval.

10. Rate bureaus should not be profitmaking enterprises.

11. A carrier member of a bureau, which carrier is affiliated in any way with a shipper, may not serve on a bureau's board of directors, general rate committee, or any other committee which has an effect, either directly or indirectly, on the ratemaking function of the bureau without specific prior Commission approval.

12. A maximum period of 120 days should be prescribed for the processing of proposals to final disposition.

13. Public notice of proposals need not identify the proponent.

14. Rate bureaus are prohibited from broadening the territorial or commodity scope of an individual rate proposal without prior adequate notice.

15. Adoption of shortened special procedures involving proposals covering special docket applications are not warranted in this proceeding.

16. Section 22 quotations require special bureau procedures limiting notification to members and the governmental agency.

17. Docketing of rate bureau proceedings with respect to general rate increase proposals need not be mandatory.

18. The Commission need not obtain and publish reports of the deliberations within the industry concerning the matter of general increases.

19. The various rate bureaus need not join in seeking general rate increases.

20. The various rail rate bureaus are not required to substantiate general increases on a regional basis only, but that regional costs should be presented in a more explicit manner.

21. Rate bureaus are prohibited entirely from protesting proposals of carrier members, and are not merely limited to instances in which the proposed rate is less than long-term variable cost or any other specific instance.

22. Rate bureaus should be prohibited from discouraging independent action proposals of member carriers in any way, including the protesting of the filing of any rates pursuant to such action.

23. Rate bureaus should be prohibited from discouraging members from publishing individual tariffs.

24. Immunity from antitrust laws shall be continued.

25. Immunity from the antitrust laws shall continue to be extended to agreements with respect to proposals of single-line movements.

26. Additional legislation is not necessary, and need not be sought, to better effect the goals for which section 5a was enacted.

APPENDIX B

List of petitioners and replicants on reconsideration

Petitioners

Carrier interests:
AAA Trucking Corporation
Association of American Railroads
Bulk Carrier Conference, Inc.
Central & Southern Motor Freight Tariff Association, Inc., individually, and joint with:
  Central States Motor Freight Bureau,
  Middle Atlantic Conference,
  Middlewest Motor Freight Bureau,
  The New England Motor Rate Bureau, Inc., and
  Pacific Inland Tariff Bureau, Inc.
Cowan, W. T., Inc.
Friedman's Express
Holmes Transportation, Inc.
Household Goods Carriers' Bureau, Inc.
Household Goods Forwarders Tariff Bureau
Jones Motor
Motor Carriers Tariff Bureau, Inc.
Motor Carriers' Traffic Association, Inc.
Movers' & Warehousemens' Association of America, Inc.
Mushroom Transportation Company, Inc.

Niagara Frontier Tariff Bureau, Inc.
National Motor Freight Traffic Association, Inc.
Penn Yan Express, Inc.
Rocky Mountain Motor Tariff Bureau, Inc.
Schuster Express, Inc.
Southern Motor Carriers Rate Conference
Steel Carriers' Tariff Association, Inc.
Tidewater Inland Express, Inc.
Western Motor Tariff Bureau, Inc.
Wilson Trucking Corporation
Wooster Express, Inc., joint with:
    Baltimore-New York Express, Inc.

Shipper interests:
Alabama Industrial Shippers Conference
Asphalt Roofing Manufacturers Association, jointly with:
    Builders Hardware Manufacturers Association,
    National Association of Electrical Distributors,
    Pencil Makers Association, and
    Steel Office Furniture Traffic Association.
Chicago Bridge & Iron Company
Drug and Toilet Preparation Traffic Conference, joint with:
    National Small Shipments Traffic Conference, and
    Eastern Industrial Traffic League.
Pacific Northwest Traffic League
Radcliff Materials, Inc., joint with:
    Oyster Shell Products, and
    S I Lime Company.
Southern Traffic League, Inc.
Vulcan Materials Company

Others:
Commonwealth of Pennsylvania*
United States Department of Defense

Replicants
Carrier interests:
Bulk Carrier Conference, Inc.
Central & Southern Motor Freight Tariff Association, Inc.
Eastern Central Motor Carriers Association
Household Goods Carriers' Bureau, Inc.
Middle Atlantic Conference, joint with:
    New England Motor Rate Bureau, and
    Pacific Inland Tariff Bureau
National Motor Freight Traffic Association, Inc.
Niagara Frontier Tariff Bureau, Inc.

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*In Appendix A of the prior report, 349 I.C.C. at 857-60, the list of respondents and participating carriers, the Commonwealth of Pennsylvania was inadvertently omitted as a participant. Its statement, however, was duly considered and the omission will be corrected in the bound volumes.

Rocky Mountain Motor Tariff Bureau, Inc.
Southern Motor Carrier Rate Conference
Steel Carriers' Tariff Association, Inc.

Shipper interests:
American Retail Federation
Asphalt Roofing Manufacturers Association, joint with:
    Builders Hardware Manufacturers Association,
    National Association of Electrical Distributors,
    Pencil Makers Association, and
    Steel Office Furniture Traffic Association
Drug and Toilet Preparation Traffic Conference, joint with:
    National Small Shipments Traffic Conference, and
    Eastern Industrial Traffic League
Hormel, Geo. A. & Co., joint with:
    Oscar Mayer & Co.,
    John Morrell & Co., and
    Rath Packing Company
National Industrial Traffic League
Society of the Plastics Industry

Others:
General Services Administration
Interstate Commerce Commission—Bureau of Enforcement

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APPENDIX E

APPENDIX E

Constitutional and Statutory Provisions

AMENDMENTS TO THE CONSTITUTION

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

INTERSTATE COMMERCE ACT:

National Transportation Policy

[*September 18, 1940.*] [*49 U. S. C. preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

INTERSTATE COMMERCE ACT:

Section 5a, 49 U.S.C. § 5b:

§ 5b. Agreements between common carriers other than common carriers by railroad generally

(1) For purposes of this section—

(A) The term "carrier" means any common carrier subject to chapters 1 (other than a common carrier by railroad), 8, or 12 of this title or any freight forwarder subject to chapter 13 of this title; and

(B) The term "antitrust laws" has the meaning assigned to such term in section 12 of Title 15.

(2) Any carrier party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges (including charges between carriers and compensation paid or received for the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation, or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5), or (6) of this section) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) of this section should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph.

(3) Each conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under the provisions of this section shall maintain such accounts, records, files, and memoranda and shall submit to the Commission such reports, as may be prescribed by the Commission, and all such accounts, records, files, and memoranda shall be subject to inspection by the Commission or its duly authorized representatives.

(4) The Commission shall not approve under this section any agreement between or among carriers of different classes unless it finds that such agreement is of the character described in paragraph (2) of this section and is limited to matters relating to transportation under joint rates or over through routes; and for purposes of this paragraph carriers by railroad, express companies, and sleeping-car companies are carriers of one class; pipe-line companies are carriers of one class; carriers by motor vehicle are carriers of one class; carriers by water are carriers of one class; and freight forwarders are carriers of one class.

(5) The Commission shall not approve under this section any agreement which it finds is an agreement with respect to a pooling, division, or other matter or transaction, to which section 5 of this title is applicable.

(6) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint con-

sideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure.

(7) The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigate and determine whether any agreement previously approved by it under this section, or terms and conditions upon which such approval was granted, is not or are not in conformity with the standard set forth in paragraph (2) of this section, or whether any such terms and conditions are not necessary for purposes of conformity with such standard, and, after such investigation, the Commission shall by order terminate or modify its approval of such agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standard or to the extent to which it finds such terms and conditions not necessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardship.

(8) No order shall be entered under this section except after interested parties have been afforded reasonable opportunity for hearing.

(9) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

(10) Any action of the Commission under this section in approving an agreement, or in denying an application for such approval, or in terminating or modifying its approval of an agreement, or in prescribing the terms and conditions upon which its approval is to be granted, or in modifying such terms and conditions, shall be construed as having effect solely with reference to the applicability of the relief provisions of paragraph (9) of this section. Feb. 4, 1887, c. 104, Part. I, § 5a, as added June 17, 1948, c. 491, 62 Stat. 472.

INTERSTATE COMMERCE ACT:

Section 216(e), 49 U.S.C. s 316(e), first sentence:

> (E) Any person, State board, organization, or body politic may make complaint in writing to the Commission that any [motor common carrier's] rate, fare, charge, classification, rule, regulation, or practice, in effect or proposed to be put into effect, is or will be in violation of this section or of section 217.

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of February, 1978, served three copies of the foregoing document by first class mail with postage prepaid upon the following:

Hon. Wade McCreed, Jr.
Solicitor General
Department of Justice
Washington, D. C. 20530

Daniel J. Sweeney, Esq.
Belnap, McCarthy, Spencer,
Sweeney & Harkaway
1750 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Mark L. Evans
General Counsel
Interstate Commerce Commission
Washington, D. C. 20423

John F. Donelan, Esq.
John M. Cleary, Esq.
Frederic L. Wood, Esq.
Renee Rysdahl, Esq.
Donelan, Cleary, Wood & Maser
914 Washington Building
Washington, D. C. 20005

Bryce Rea, Jr.

Supreme Court, U. S.
FILED
APR 14 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1190

ALL ISLAND DELIVERY SERVICE, INC.,
FEUER TRANSPORTATION, INC.,
JOHN A. JUNGERMAN SON, INC.,
PINTER BROS., INC.,
TROIANO EXPRESS CO., INC.,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION ET AL.,
Respondents.

Brief Of Respondents Drug And Toilet Preparation Traffic Conference Eastern Industrial Traffic League National Small Shipments Traffic Conference, Inc. In Opposition To Petition For Writ Of Certiorari

DANIEL J. SWEENEY
CHARLES J. McCARTHY
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 393-5710

BELNAP, McCARTHY, SPENCER,
SWEENEY & HARKAWAY

Of Counsel

April 14, 1978

DI CESARE — Printing — Washington, D.C. 20006 (202) 331-8101

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

ARGUMENT 5

I. The Statutory Issue Is Not Substantial 5

II. The First Amendment Issue is Not Substantial 7

CONCLUSION 12

TABLE OF CASES

Page

American Communications Ass'n v. Douds, 339 U.S. 382 (1950) 10

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) 11

Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974) 5

California Motor Transport v. Trucking Unlimited, 404 U.S. 508 (1972) 11

Carter v. Carter Coal Co., 298 U.S. 238 (1936) 10

Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com., 412 U.S. 94 (1973) 6

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 11

Hardin v. Kentucky Utilities Company, 390 U.S. 1 (1968) 6

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 9

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 6

State of Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945) 9

United Mine Workers of America v. Pennington, 381 U.S. 657 (1965) 11

United Public Workers v. Mitchell, 330 U.S. 75 (1947) 10

United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975) 9

United States v. O'Brien, 391 U.S. 367 (1968) 8

United States v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897) 9

Va. St. Bd. of Pharm. v. Va. Cit. Cons. Council, 425 U.S. 748 (1976) 11

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Respondents.

Brief Of Respondents
Drug And Toilet Preparation Traffic Conference
Eastern Industrial Traffic League
National Small Shipments Traffic Conference, Inc.
In Opposition To
Petition For Writ Of Certiorari

QUESTIONS PRESENTED

Section 5a of the Interstate Commerce Act confers antitrust immunity on carriers for price fixing carried on under an agreement approved by the Interstate Commerce Commission (Commission). In an investigation instituted to determine whether it should require amendment of any Section 5a agreements, the Commission prescribed, as a condition of continued approval of such agreements, a requirement that they be amended to prohibit the protesting by a rate bureau of rates proposed by a member carrier individually and published by the rate bureau as publishing agent for such member carrier.

The questions presented are whether the foregoing condition is beyond the lawful powers of the Commission because impermissible (a) under the statute; or (b) under the First Amendment to the Constitution.

STATUTORY PROVISIONS

Sections 5b and 13(1) of the Interstate Commerce Act, 49 U.S.C. §5c, 49 U.S.C. §13(1) (not included in Appendix E to the Petition), are included in the appendix to this brief.

STATEMENT OF THE CASE

Section 5a of the Interstate Commerce Act (49 U.S.C. §5b) authorizes the Commission to approve agreements among carriers for the collective establishment of rates and relieves the carriers from the operation of the antitrust laws with respect to the carrying out of approved agreements in accordance with (1) their provisions and (2) the terms and conditions of approval prescribed by the Commission. The standards for approval are clearly stated in the Act. The Commission is directed to approve a Section 5a agreement *only* if it finds that its approval will be in furtherance of the National Transportation Policy and *only* upon such terms and conditions as it may prescribe as necessary to assure that result (Section 5a(2)). Approval of an agreement which does not accord member carriers the "free and unrestrained right to take independent action" is expressly prohibited (Section 5a(6)).

Section 5a agreements are carried out through rate bureaus, which are organizations created by the parties to each such agreement. The rate bureaus are the means by which the carriers meet and establish rates collectively; they also serve as publishing agents for their members. For many years, rate bureaus have followed the practice of protesting rates proposed by individual carrier members which they did not approve. In the typical situation, a member carrier asks the bureau to publish a rate on a lower level than that established by the Bureau for its members generally. The bureau publishes the rate for the individual carrier but, when the rate is published, it files a protest with the Commission and asks for suspension. If the Commission then orders an investigation, the rate bureau presents testimony and briefs challenging the lawfulness of the rate. The rate bureaus are staffed with attorneys and technicians who are well-equipped to file protests and to litigate the lawfulness of a rate. The individual carrier is thus faced with the burden and expense of defending its proposal against well-financed opposition; and it must, moreover, bear a share of the expense incurred by the rate bureau in challenging its proposal.

Section 5a(7) authorizes the Commission to conduct investigations to determine whether previously approved agreements conform to the statutory standards and to modify the terms and conditions on which approval was granted if it finds such action to be necessary to insure conformity with the statutory standard. In Ex Parte No. 297, the Commission entered into an investigation of the activities of rate bureaus for the purpose of determining whether it should require that any such agreements be amended.

Following completion of its investigation, the Commission issued its Report and Order on June 16, 1975. In response to contentions by shippers and their trade associations that protests by bureaus against the rates of their members constitute "intimidation and coercion of smaller or 'innovative' carriers who do not possess the resources to defend their proposals against the collective weight, funds, and expertise of the bureaus" (Pet. App. 49a), the Commission found that "selective protests can be an [sic] effective as mass protests to obstruct competition and choke rate initiatives" (*Id.* 50a), that "using the bureaus as a method of policing the independent actions of a few carriers has the practical effect of stifling competition" (*Id.* 51a), and that "to continue to allow rate bureaus to protest the independent action proposals of member carriers would be an abuse of the administrative process. . . ." (*Id.* 51a).[1]

The Commission ordered "[T]hat rate bureaus be, and they are hereby, prohibited from protesting proposals of member carriers" (*Id.* 67a) and "[T]hat member carriers of rate bureaus be, and they are hereby, required to file appropriate amendments to their respective agreements consistent with the requirements, standards, and findings set forth in the attached report. . . ." (*Id.* 67a)

Section 5a(10) provides that the only effect of action by the Commission in prescribing terms and conditions of approval of Section 5a agreements, or modifying such terms and conditions, is to withdraw antitrust immunity if the terms and conditions are not met. The effect of the Commission order, therefore, was to withdraw antitrust immunity unless the required amendments were made.

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[1] In its Report and Order on Reconsideration issued January 30, 1976, the Commission further found that "bureau protests are a deterrent to individual member carriers' free and unrestrained right of independent action," that "[T]he protests by the rate bureaus of independent action proposals does inhibit competition" (*Id.* 91a) and that "In order to prevent any threat to the free and unrestrained right of carrier independent action, the public interest and furtherance of the national transportation policy require that we condition our approval of an agreement against bureau protests of members' independent action proposals." (*Id.* 90a)

The Report and Order on Reconsideration modifies the June 16, 1975 order by requiring that the amendments to Section 5a agreements prohibit only the protesting of proposals filed by the rate bureau as tariff publishing agent. Pending further study by the Commission, the bureaus are free to protest rates of their members which are published in an individual carrier's tariff. (Pet. App. 93a)

The Commission's order was affirmed by the Court below in an opinion by Mr. Justice Clark (Pet. App. A) and was again affirmed on rehearing (Pet. App. B).

The Petition raises only constitutional and statutory issues. No issue is presented as to whether the condition prescribed by the Commission lacks a rational basis (*Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974)) or is otherwise improper.

ARGUMENT

I.

The Statutory Issue Is Not Substantial

In granting to carriers the right to fix rates by concerted action with antitrust immunity, the Congress vested in the Commission a broad discretion to surround its approval of Section 5a agreements with the safeguards necessary to insure that that freedom not be abused. The Act requires the Commission to approve Section 5a agreements only on such terms and conditions as it deems necessary to insure that its approval will be in furtherance of the National Transportation Policy. The Commission is also required to exercise continuing supervision and to impose additional terms and conditions as deemed necessary to accomplish that objective. Furthermore, the Congress has made very clear that, in any Section 5a agreement, the individual carrier's "free and unrestrained right to take independent action" must be preserved.

Petitioners' basic argument is that the general language of Section 216(e) of the Interstate Commerce Act (Pet. App. 106a), which authorizes any "organization" to protest rates, must take precedence over the later enacted and more specific provisions in Section 5a. It is the responsibility of the Commission to harmonize Sections 5a and 216(e) and it has done so in a manner consistent with the Congressional purpose.[2] This case, therefore, comes within the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com.*, 412 U.S. 94, 121 (1973) quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969) and the related principle that the determination of a federal agency "is entitled to acceptance unless it lies outside the range of permissible choices contemplated by the statute..." *Hardin v. Kentucky Utilities Company*, 390 U.S. 1, 8 (1968).

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[2] Section 216(e) is included in Part II of the Interstate Commerce Act which applies to motor carriers. Section 13(1), the comparable provision in Part I which applies to railroads, also authorizes any "organization" to protest rates (App. p.). When the Congress revised Part I in the Railroad Revitalization and Regulatory Reform Act of 1976, it expressly prohibited the Commission from approving any agreement between railroads which permits a railroad rate bureau to protest rates established by independent action (App. p.). It is significant that the Congress did not find that this amendment required an amendment limiting the scope of Section 13(1).

Petitioners argue that:

> The only authority Section 5a gives the ICC is the authority to approve agreements relating to the "joint consideration, initiation or establishment" of rates and charges, *i.e.*, agreements between carriers to collectively make their rates. (Pet. p. 12)

Petitioners overlook the statutory grant of authority to the Commission to condition its approval of agreements to insure that they comply with the statutory standard. The statutory authorization to impose such conditions as the Commission deems necessary specifically includes the right to impose conditions which will prevent rate bureaus from taking action which interferes with the free and unrestrained right of members to take independent action; and the Commission has found that the filing of protests by bureaus against their own members' rates does deter the exercise of that right. The Commission has said that it will not authorize antitrust immunity to a rate bureau unless the bureau agrees that it will not engage in protesting the independent rate actions of its members. It has thus attached to the antitrust immunity for joint price-fixing a condition which is directly related to that function and which, therefore, is clearly authorized by the statute.

II.

The First Amendment Issue Is Not Substantial

These Respondents agree with Petitioners that the protesting of proposed rates filed with the Commission is "speech" within the meaning of the First Amendment. It does not follow, however, that the condition imposed by the Commission's order is unconstitutional. In the exercise of its constitutional powers, the Government can impose reasonable restraints on the exercise of functions falling within the descriptive scope of the First Amendment freedoms.

The basic fallacy in Petitioners' position is the assumption that First Amendment freedoms can be restrained only where it is established that they are being used with an evil intent. The right of the Government to impose reasonable restraints on the exercise of First Amendment freedoms has never been that rigidly circumscribed. The controlling principles are set out in *United States v. O'Brien*, 391 U.S. 367, 377 (1968) as follows:

> . . . a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The limitation on the right to protest here involved meets all of these tests.

The Interstate Commerce Act was enacted by the Congress in the exercise of its constitutional power to regulate interstate commerce. Its objectives (including economical and efficient service and reasonable rates) are set out in the National Transportation Policy (Pet. App. 101a–102a). In Section 5a, Congress sought to achieve a balance between the need of carriers to take joint action on rates and the public interest in preserving competition.

The privilege conferred upon the carriers by Section 5a is an extraordinary one. It is nothing less than the right to take action which would be criminal in the unregulated sector of the economy. Such a grant of immunity must be narrowly construed.[3] In the absence of Section 5a, rate bureaus probably would not even exist; certainly they could not engage in the concerted fixing of rates without violating the antitrust laws[4]—and, absent the immunity to fix common rates, they would have no opportunity to take on the function of protesting non-conforming rates of their member carriers.

The restriction imposed by the Commission is narrowly drawn and no greater than necessary. Individual carriers can protest the rate of any other carrier and two or more carriers can join together to do so. For it is only the action of the rate bureau and not that of its individual members that is proscribed. Antitrust immunity is lost only if the bureau insists on carrying on a program of protesting rates published by it as agent for its member carriers.

Petitioners would construe the First Amendment as a straight-jacket which prevents the Federal Government from carrying out its responsibilities under the Commerce Clause in a rational manner designed to achieve proper governmental objectives. They must concede that the government need not permit carriers to engage in concerted price fixing. But they argue that the government has only two options: to deny this privilege to the bureaus or to permit them also to force their members to hold the line on rates by protesting non-conforming rates proposed by their members. Surely, the Constitution is sufficiently flexible to accord government the further option of permitting price fixing with antitrust immunity on condition that the rate bureaus not take the further step of stifling competition by protesting non-conforming rates of their members.

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[3] *Cf. Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975).

[4] *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897); *State of Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945).

The present case is controlled by cases such as *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950), and *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). *Douds* upheld, against a First Amendment challenge, the provision of Section 9(h) of the Labor Management Relations Act of 1974, which conditioned recognition of a labor union on the filing of non-communist affidavits by its officers. The rationale of the Court was that the infringement of First Amendment freedoms was not undue and that "the remedy provided by §9(h) bears reasonable relation to the evil which the statute was designed to reach."[5] (339 U.S. at 390-391)

In *Mitchell*, this Court upheld the constitutionality of the Hatch Act which prohibits political activity by federal employees. The rationale of *Mitchell* was summarized by the Court in *Douds* as follows:

> The decision was not put upon the ground that government employment is a privilege to be conferred or withheld at will.... But the rational connection between the prohibitions of the statute and its objects, the limited scope of the abridgment of First Amendment rights, and the large public interest in the

---

[5] It should be noted that, were the court to hold that the Commission's action violates the First Amendment, it would follow that Section 5b(5)(a) of the Interstate Commerce Act (App. p.   ) is also unconstitutional. Since this subsection is an express condition on the grant of antitrust immunity in Section 5b, it is not a separable provision and the grant of immunity would fall with it. *Carter v. Carter Coal Co.*, 298 U.S. 238, 312-316 (1936).

> efficiency of government service, which Congress had found necessitated the statute, led us to the conclusion that the statute may stand consistently with the First Amendment. (339 U.S. at 405)

Bates v. State Bar of Arizona, 433 U.S. 350 (1977) and *Va. St. Bd. of Pharm. v. Va. Cit. Cons. Council*, 425 U.S. 748 (1976), the cases primarily relied on by Petitioners, are not in point. Those cases hold only (1) that commercial speech is protected by the First Amendment and (2) that the state had shown no state interest sufficient to justify the ban on advertising.

Petitioners' reliance on *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965) is also misplaced. Those cases hold that it is not a violation of the antitrust laws for parties to join together to seek governmental action. That issue is not presented in this case.[6] What is involved is the validity of a condition to a grant of antitrust immunity which was found necessary to achieve a valid statutory purpose and to protect the public interest. The prescribed condition is clearly permissible; it does not present a substantial First Amendment question.

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[6] Petitioners argue that this case does not come within the exception to the *Noerr-Pennington* doctrine spelled out in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972) that joining together to seek governmental action is a violation of the antitrust laws if the purpose is to harass and deter competition. Since this case does not come within the *Noerr-Pennington* doctrine at all, it is not necessary to consider whether it comes within the *California Transport* exception to that doctrine.

CONCLUSION

The writ of certiorari prayed for by Petitioners should be denied.

Respectfully submitted,

DANIEL J. SWEENEY
CHARLES J. McCARTHY
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006

BELNAP, McCARTHY, SPENCER,
SWEENEY & HARKAWAY

Of Counsel

APPENDIX

INTERSTATE COMMERCE ACT

Section 5b, 49 U.S.C. §5c

§5c. Agreements between common carriers by railroad subject to this chapter

Definitions

(1) As used in this section, the term—

(a) "affiliate" means any person directly or indirectly controlling, controlled by, or under common control or ownership with, any other person, and as used in this subdivision, the term (i) "control" has the same meaning as in section 1(3)(b) of this title; and (ii) "ownership" refers to equity holdings of 5 per centum or more in any business entity;

(b) "antitrust laws" means the Act of July 2, 1890, as amended, the Act of October 15, 1914, as amended, the Federal Trade Commission Act, sections 73 and 74 of the Act of August 27, 1894, as amended, and chapter 592 of the Act of June 19, 1936, as amended; and

(c) "carrier" means any common carrier by railroad subject to this chapter.

Application to Commission for Approval of Agreements; Rules and Regulations; Criteria

(2) Any carrier which is a party to an agreement, between or among two or more carriers, relating to rates, fares, classification, divisions, allowances, or charges (including charges between carriers and compensation paid or received for

the use of facilities and equipment), or rules and regulations pertaining thereto, or procedures for the joint consideration, initiation, or establishment thereof, shall, under such rules and regulations as the Commission shall prescribe, apply to the Commission for approval of such agreement. The Commission shall, by order, approve any such agreement if approval thereof is not prohibited by paragraph (4) or (5) of this section and if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (8) of this section should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. No such approval shall be granted or continued (a) if any of the terms and conditions which are prescribed under the last sentence of this paragraph are violated or not complied with, or (b) unless the Commission receives a verified written statement (and any written supplement or addendum thereto requested by the Commission) setting forth, with respect to each carrier which is a party to such agreement (i) its name, (ii) the mailing address and telephone number of its headquarter's office, (iii) the names of each of its affiliates, (iv) the names, addresses, and affiliations of each of its officers and directors and of each person who, together with any affiliate, owns or controls any debt, equity, or security interest in it having a value of $1,000,000 or more, and (v) such other information as the Commission directs to be included. The approval of the Commission shall be granted only upon such terms and conditions as the Commission determines are necessary to enable its approval to be granted in accordance with the standard set forth in this paragraph.

Maintenance of Accounts and Records by Conferences, Bureaus, Committees, Etc.; Investigative and Reporting Powers of Commission

(3) Each conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under the provisions of this section shall maintain such accounts, records, files, and memoranda and shall submit to the Commission such reports, as may be prescribed by the Commission. All such accounts, records, files, and memoranda shall be subject to inspection by the Commission may conduct investigations, make reports, issue subpoenas, conduct hearings, require the production of relevant documents, records, and property, copy and verify the correctness of information subject to inspection, and take depositions (a) to determine whether any such conference, bureau, committee, or other organization, or any carrier which is a party to any such agreement, has acted or is acting in compliance with the provisions of this section, regulations issued under this section, and the public interest, (b) to determine whether any such organization or carrier is inhibiting an efficient utilization of transportation resources or has established practices which are inconsistent with efficient, flexible, and economic operation, and (c) for such other purposes as the commission considers appropriate.

Pooling or Division Agreements

(4) The Commission shall not approve under this section any agreement which it finds is an agreement with respect to a pooling, division, or other matter or transaction to which section 5 of this title is applicable.

Agreements for Determining Matters Through Joint Consideration; Limitations

(5)(a) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration, unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action, without fear of any sanctions or retaliatory action, at any time before or after any determination arrived at through such procedure. In no event shall any conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under the provisions of this section—

(i) permit participation in agreements with respect to, or any voting on, single-line rates, allowances, or charges established by any carrier;

(ii) permit any carrier to participate in agreements with respect to, or to vote on, rates, allowances, or charges relating to any particular interline movement, unless such carrier can practicably participate in such movement; or

(iii) permit, provide for, or establish any procedure for joint consideration or any joint action to protest or otherwise seek the suspension of any rate or classification filed by a carrier of the same mode pursuant to section 15(8) of this title where such rate or classification is established by independent action.

As used in clause (i) of this subdivision, a single-line rate, allowance, or charge is one that is proposed by a single carrier applicable only over its own line and as to which the service (exclusive of terminal services provided by switching, drayage, or other terminal carriers or agencies) can be performed by such carrier.

(b) The limitations set forth in subdivision (a) shall not be applicable to—

(i) general rate increases or decreases, if the agreements accord the shipping public, under specified procedures, adequate notice of at least 15 days of such proposals and an opportunity to present comments thereon, in writing or otherwise, prior to the filing with the Commission of the tariffs containing such increases or decreases, or

(ii) broad tariff changes if such changes are of general application or substantially general application throughout a territory or territories within which such changes are to be applicable.

In any proceeding in which it is alleged that a carrier voted or agreed upon a rate, allowance, or charge, in violation of the provisions of this section, the party alleging such violation shall have the burden of showing that such vote or agreement occurred. A showing of parallel behavior is not, by itself, sufficient to satisfy such burden.

Investigation of Prior Approved Agreements; Termination or Modification of Approval; Effective Date; Review of Approval; Report to President and Congress; Termination or Suspension of Approval

(6)(a) The Commission is authorized, upon complaint or upon its own initiative without complaint, to investigate and determine whether any agreement previously approved by it under this section, or terms and conditions upon which such approval was granted, is not or are not in conformity with the standards set forth in paragraph (2) of this section and with the public interest, and whether any such terms and conditions are not necessary or whether any additional or modified terms and conditions are necessary for purposes of conformity with such standard. After any such investigation the Commission shall, by order, terminate or modify its approval of such an agreement if it finds such action necessary to insure conformity with such standard, and shall modify the terms and conditions upon which such approval was granted to the extent it finds necessary to insure conformity with such standard or to the extent to which it finds such terms and conditions not necessary to insure such conformity. The effective date of any order terminating or modifying approval, or modifying terms and conditions, shall be postponed for such period as the Commission determines to be reasonably necessary to avoid undue hardship.

(b) The Commission shall periodically, but not less than once every 3 years, review each agreement which the Commission has by order approved under this section to determine whether such agreement, or any conference, bureau, committee, or other organization established or continued pursuant to such agreement, still conforms with the standard set forth in paragraph (2) of this section and the public interest, and to evaluate the success and effect upon the consuming public and the national rail freight transportation system of such agreement and organization. The Commission shall report to the President and to the Congress on the results of such reviews, as part of its annual report pursuant to section 21 of this title. If the Commission makes a determination that any such agreement or organization is no longer in conformity with such standard, the Commission shall by order terminate or suspend its approval thereof.

Hearings

(7) No order shall be entered under this section except after interested parties have been afforded a reasonable opportunity for a hearing.

Relief From Operation of Antitrust Laws

(8) Parties to any agreement approved by the Commission under this section and other persons are, if the approval of such agreement is not prohibited by paragraph (4) or (5) of this section, hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

Applicability of Commission's Action

(9) Any action of the Commission under this section (a) in approving an agreement, (b) in denying an application for such approval, (c) in terminating or modifying such approval, (d) in prescribing the terms and conditions upon which such approval is to be granted, or (e) in modifying such terms and conditions, shall be construed as having effect solely with reference to the applicability of the relief provisions of paragraph (8) of this section.

Periodic Assessment and Report by Federal Trade Commission to Commission Regarding Agreements, Etc.; Consultations; Availability of Report

(10) The Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, shall periodically prepare an assessment of, and shall report to the Commission on (a) any possible anticompetitive features of (i) any agreements approved or submitted for approval under this section, and (ii) any conferences, bureaus, committees, or other organizations operating under such agreements, and (b) possible

ways to eliminate or alleviate any such anticompetitive features, effects, or aspects in a manner that will further the goals of the national transportation policy and this Act. The Commission shall make such reports available to the public.

Time for Final Disposition of Rule, Rate or Charge Docketed With Conferences, Bureaus, Committees, Etc.

(11) Any conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under this section shall make a final disposition with respect to any rule, rate, or charge docketed with such organization within 120 days after such proposal is docketed.

Feb. 4, 1887, c. 104, Part I, §5b, as added Feb. 5, 1976, Pub.L. 94-210, Title II, §208(b), 90 Stat. 42, and amended Oct. 19, 1976, Pub.L. 94-555, Title II, §220(k), 90 Stat. 2630.

Section 13(1), 49 U.S.C. §13(1)

Complaints To and Investigations By Commission

Complaint to Commission of Violation of Law By Carrier; Reparation; Investigation

(1) Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Supreme Court, U. S.
FILED
APR 15 1978
MICHAEL RODAK, JR., CLERK

No. 77-1190

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALL ISLAND DELIVERY SERVICE, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

MARK L. EVANS,
General Counsel,

HENRI F. RUSH,
Associate General Counsel,
Interstate Commerce Commission,
Washington, D.C. 20423.

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1. Petitioners challenge the decision of the Interstate Commerce Commission to forbid rate bureaus to file protests against rate tariffs filed by their members. The background of this litigation is described at pages 1-4 of our brief in opposition to No. 77-755, the companion case to this petition.[1]

The Commission entertained arguments from shippers and other persons who contended that, if rate bureaus were allowed to file protests against tariffs of single carriers, the bureaus could practice "intimidation and coercion of smaller or 'innovative' carriers who do not possess the resources to defend their proposals against the collective weight, funds, and expertise of the bureaus" (Pet. App. 49a). The Commission found no "evidence of any flagrant abuse by rate bureaus in the exercise of [their] right to protest" (*id.* at 50a). But the Commission also concluded that "selective protests can be as effective as mass protests to obstruct competition and choke rate initiatives" (*ibid.*).

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[1] We are furnishing counsel for petitioners in this case with copies of our response in No. 77-755, and we are furnishing counsel for petitioners in No. 77-755 with copies of this memorandum.

Starting with the premise "that antitrust immunity must be strictly and narrowly construed" (Pet. App. 50a) and that "[t]he right of a carrier member of a ratemaking bureau to take independent action at any time in the ratemaking process is absolute" (*ibid.*), the Commission concluded that "it is necessary to limit the bureaus' right to protest in order to foster independent action" (*ibid.*).[2] The Commission explained that individual bureau members could continue to file protests, but that "using the bureaus as a method of policing the independent actions of a few carriers has the practical effect of stifling competition" (*id.* at 51a).

The Commission adhered to its decision after reconsideration (Pet. App. 88a-94a). It stated (*id.* at 90a): "We cannot emphasize too strongly that the right of a carrier member of a ratemaking bureau to take independent action before or after the collective ratemaking process is absolute * * *." "If a practice restricts or tends to restrict the right of carrier independent action, the statute requires that it be prohibited. On this record, we have become convinced that bureau protests are a deterrent to individual member carriers' free and unrestrained right of

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[2] 62 Stat. 472, 49 U.S.C. 5b(6), provides that the Commission "shall not approve * * * any [rate bureau] agreement * * * unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action * * *."

independent action. * * * We take official notice of the fact that since our prohibition became effective on July 15, 1975, there has been a substantial increase in the publication of independent action proposals and a decrease in the number of protests filed" (*id.* at 91a).

The court of appeals affirmed (Pet. App. 1a-14a). It relied on the Commission's statutory authority to impose on the rate bureaus any conditions the Commission believes to be necessary (*id.* at 7a) and agreed with the Commission's conclusion that the rule is necessary to promote independent action by rate bureau members (*id.* at 8a). The court granted a petition for rehearing but adhered to its earlier decision (*id.* at 15a-16a).[3]

2. Petitioners do not argue that the Commission's decision is arbitrary, capricious, or unsupported by substantial evidence. They argue, instead, that the Commission must allow rate bureaus to protest independent tariffs even if, as the Commission found, such protests will adversely affect the statutory right of independent action. Petitioners rely on both the right of protest specified in Section 216(e) of the Interstate Commerce Act, as added and amended, 49 Stat. 558, 49 U.S.C. 316(e), and the First Amendment.

The rule against protests by rate bureaus does not, however, abrogate the right of protest created by Section

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[3] The initial decision had been rendered by a divided court; the majority opinion had been written by Mr. Justice Clark and delivered only after his death. As a technical matter, therefore, the panel initially was unable to render a decision. Judge Hall joined the panel on rehearing and joined Judge Butzner to adopt Mr. Justice Clark's opinion as the opinion of the court. Judge Widener dissented, arguing that any organization, including a rate bureau, has an unqualified statutory right to file a protest against any tariff (Pet. App. 11a-14a, 16a).

216(e). Any carrier may file a protest in its own name.[4] The Commission's rule simply restricts the extent to which carriers may file protests collectively through a particular agent. And the restriction on the right of carriers to act through the rate bureau as an agent is authorized by the Reed-Bulwinkle Act of 1948, 62 Stat. 472, 49 U.S.C. 5b(2), which provides that the Commission may impose on the operation of rate bureaus "such terms and conditions as the Commission may [find] necessary * * *."

The rate bureaus' principal function is to permit carriers to discuss rates. To make that discussion possible, Congress authorized the Commission to give antitrust immunity to the bureaus (49 U.S.C. 5b(9)). But Congress' recognition that collective action, free from antitrust scrutiny, might lead to abuse is reflected in the fact that no rate bureau may have antitrust immunity without the Commission's permission, and on the Commission's terms.

The rule against filing protests is a reasonable one, which serves to confine the bureaus closely to their major purpose (rate deliberations) and gives force to the principle that antitrust immunity should not be extended more broadly than necessary. See *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 217-218. The Commission found that rate bureau protests "obstruct competition and choke rate initiatives" (Pet. App. 50a), and nothing in the statute requires the Commission to give antitrust immunity to entities that engage in these practices that stifle the independent action that the Act was designed to preserve.[5]

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[4] Carriers also may file protests jointly (Pet. App. 92a).

Petitioners' argument based on the First Amendment fares no better. The Commission has not prohibited any carrier from filing a protest; it has simply limited the carriers' choice of agents. None of the cases on which petitioners rely dealt with a limitation of this sort. The Commission has decided only that a rate bureau may not *both* protest independent filings *and* claim antitrust immunity for its collective ratemaking processes.

It is unnecessary to consider whether the First Amendment itself protects a "right to file protests" because, at all events, the First Amendment does not protect a right to have antitrust immunity. Antitrust immunity is a valuable benefit given by the Commission, under the statute, to collective activities of organizations that will advance the national transportation goals. The Commission may properly conclude that an organization desiring to take advantage of that benefit must engage in less than all of the activities that might be among the constitutional rights of persons and organizations in general.[6] The Commission has concluded that rate bureaus should concentrate on collective discussions of rates, and that carriers desiring to protest independent tariffs should do so themselves or through some other organization. Such a decision is especially appropriate where, as here, the Commission has concluded that rate bureau protests frustrate the right of independent action conferred by Section 5b(6) and thus frustrate one of the statutory goals that Congress sought to achieve by extending antitrust immunity.

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[5] There is no foundation for petitioners' apparent argument that Section 216(e) gives rate bureaus an "absolute" right to file protests that is outside the scope of the Commission's power to impose conditions under Section 5b(2). Section 216(e) does not refer to rate bureaus at all, and, as the Commission explained (Pet. App. 91a-92a), "[t]he general language of section 216(e) * * * cannot be used to defeat the authority of the Commission to condition its approval or continued approval of carrier ratemaking agreements to achieve the express statutory standards * * * and the prohibition of section [5b(6)]" against bureau interference with independent carrier action.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARK L. EVANS,
General Counsel,

HENRI F. RUSH,
Associate General Counsel,
Interstate Commerce Commission.

APRIL 1978.

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[6] See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1. The Court held in *Buckley* that candidates have a right, protected by the First Amendment, to spend as much money as they have available to promote their candidacies. But it also held (424 U.S. at 57 n. 65, 97-104) that Congress could require the candidates to forego the exercise of this right if they chose to accept public financing. Similarly, here, we may assume that organizations have a right to file protests. But the Commission, acting pursuant to statutory authority, may require rate bureaus to forego this right if they choose to accept the benefit of antitrust immunity for their essential ratemaking activities.

Supreme Court, U. S.
FILED
APR 17 1978
MICHAEL RODAK, JR., CLERK

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Petitioners,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT
The National Industrial Traffic League

JOHN F. DONELAN
FREDERIC L. WOOD
JOHN K. MASER III

DONELAN, CLEARY, WOOD & MASER
914 Washington Building
Washington, D.C. 20005
(202) 783-1215

Attorneys for Respondent

Dated: April, 1978

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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JURISDICTION

In addition to the statutory provision cited by petitioners, jurisdiction in this Court is based on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the action taken by the Interstate Commerce Commission to protect the paramount right of independent action unconstitutionally restrict the right of motor carriers to use a rate bureau to seek suspension and investigation of a rate tariff?

2. Was the I.C.C.'s action authorized by Section 5a of the Interstate Commerce Act and, if so, was it inconsistent with Section 216(e)?

ARGUMENT

No Substantial Constitutional Issue Exists Which Requires Review

To place the constitutional issue raised by petitioner in its proper context, and to illuminate clearly its insubstantiality, it is necessary to highlight the important provision of Section 5a which provided the statutory basis for the actions of the Interstate Commerce Commission and the court of appeals. Section 5a(6) prohibits the I.C.C. from granting immunity from the antitrust laws for any agreement among carriers for joint consideration of rates "unless it finds that . . . there is accorded to each party the free and unrestrained right to take independent action . . . " The I.C.C. and the court of appeals both recognized that the right of independent action " . . . . is paramount to maintaining the integrity of the grant of antitrust immunity."[1]

The I.C.C., after reviewing the evidence in the record before it, concluded that in order to protect the absolute right of a carrier member of a rate bureau to take independent action, it must prohibit the bureau from seeking to obtain an investigation and suspension by the I.C.C. of the independent action of its own members.[2] This is the kind of retaliatory action against independent action which inhibits and stifles competition[3] and "chills" the exercise of independent action.[4]

A reasoned consideration of the judicial and administrative actions under review in the context of the Congressional policy protecting independent action will reveal the insubstantiality of the constitutional issue these few carriers have tried to raise. There can be no serious contention that the Commission's action was an unconstitutional infringement of the petitioning carriers' First Amendment right to petition the I.C.C. for relief. These carriers still have that right, collectively or individually, as the I.C.C. recognized.[5]

When collective action by such carriers to petition for relief is taken (whether or not they use a rate bureau), it is immune from the antitrust laws because of the importance of the activity under the First Amendment. See *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972).[6] The principles discussed in that case suggest that a protest by a rate bureau against independent action would be constitutionally protected from antitrust liability by the *implied* immunity discussed in that case despite the I.C.C.'s withdrawal of the *express* immunity otherwise available under the statutory authority of Section 5a.

Why then are these few carriers so concerned with overturning the Commission's action? The answer must be that the implied immunity from the antitrust laws in the *California Motor Transport* case is subject to a very serious limitation, from their point of view. The collective activity cannot be a "mere sham" to cover an attempt to interfere directly with a competitor's business relationships. See 404 U.S. at 511-515.

To avoid this limitation on their collective action motor carriers would obviously prefer the protection of the express statutory immunity available to them if the Commission approved, or at least did not prohibit, the collective action involved in protests by a rate bureau against independent action tariff publications. See Section 5a(9), 49 U.S.C. §5b(9).

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[1] 349 I.C.C. at 844 and 559 F.2d at 1255, reproduced in petitioners' appendix at 50a and 8a, respectively.

[2] Once a carrier determines to take independent action on rates, it must then file a tariff with the I.C.C. publishing the rate proposal. Section 217, 49 U.S.C. §317.

[3] 349 I.C.C. at 845, 351 I.C.C. at 460, App. 51a and 91a.

[4] 559 F.2d at 1255, App. 8a.

[5] 351 I.C.C. at 461, App. 92a.

[6] See also *City of Lafayette v. Louisiana Power & Light Co.*, ____ U.S. ____, 46 U.S.L.W. 4265, 4268 (March 29, 1978).

In substance, the petitioners are objecting only to the loss of their express statutory immunity to use a rate bureau as their agent for collective protests against the independent action rate proposals of their fellow members. Contrary to their claims, the I.C.C. and the court of appeals have not deprived them of any First Amendment right.

Even if the I.C.C.'s action could be considered a limitation on the exercise of such a right by these motor carriers, it is a legitimate limitation. Rate bureaus exist only at the sufferance of Congress, which has provided them with an express immunity from the antitrust laws. But for this immunity, there is no doubt that rate bureau agreements would be illegal price-fixing agreements. See *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 456 (1945).[7] Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

This Court has also held that the assertion of a First Amendment right does not confer blanket immunity from the antitrust laws. See, e.g., *Citizens Publishing Co.* v. *United States*, 394 U.S. 131, 139-140 (1969), and *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

The antitrust laws and the Interstate Commerce Act are both founded on Congress' constitutional authority to regulate commerce between the states. See *Northern Securities Co.* v. *United States*, 193 U.S. 197, 335-338 (1904), and *Louisville & N.R. Co.* v. *Mottley*, 219 U.S. 467, 480-486 (1911). These cases and their generations of descendants demonstrate the legitimate interest of Congress in the economic regulation under the commerce clause of carriers and the transportation industry.

This strong governmental interest, which is largely administered by the Commission, provides a solid basis for

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[7] After the enactment of Section 5a, this action brought under this Court's original jurisdiction was dismissed. 340 U.S. 889 (1950).

whatever limited restriction has been placed on free expression by the Commission. The right to free expression is not absolute, and its exercise may be regulated by the government. This Court outlined the permissive scope of such regulation in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), reh. den., 393 U.S. 900:

> ". . . we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[8]

In this case, it is clear that Section 5a is within the constitutional power of Congress to enact, and it may delegate its administration to the Commission. The statute implements a legislative policy decision to accommodate certain conflicting policies of the antitrust laws and the Interstate Commerce Act.[9] The necessity for this accommodation is unrelated to any policy of suppression of free expression.

Finally, the restriction placed by the Commission on the right of the rate bureaus to protest is very limited. They are barred only from protesting independent actions of their own members. Moreover, the member carriers of a rate bureau may still, in their own names, either individually or collectively, protest an independent action proposal by another member carrier. They must, however, observe the limits placed on such activity by this Court's decision in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972).

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[8] See also *Bates v. State Bar of Arizona*, ____ U.S. ____, 53 L.Ed. 2d 810, 835-836 (1977), *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 770-773 (1976), and *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975), which establish the authority of governmental agencies to regulate commercial speech.

[9] H.R. Rep't. No. 1100, 80th Cong. 1st Sess. (1947). See also 351 I.C.C. at 460, App. 91a.

The Agency's Action Is Consistent With The Statute

The motor carriers next contend that the I.C.C.'s action withdrawing from the rate bureaus express immunity for collective action seeking suspension of their own members' independent action tariff publications is not authorized by Section 5a. They also contend that, even if authorized, it is inconsistent with the provisions of Section 216(e).[10]

The petitioners contend that the Commission lacks statutory authority under Section 5a to condition its approval of rate bureau agreements with a prohibition against their claimed right to protest. The express provisions of the statute and the record before the Commission demonstrate the validity of its action. Section 5a of the Interstate Commerce Act represents an accommodation by Congress of the conflicting policies of the antitrust laws and the collective ratemaking practices of the carriers which had arisen from the various substantive requirements of the Interstate Commerce Act.[11]

The statutory scheme has been carefully constructed by the Congress to accomplish this accommodation. Section

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[10] 49 U.S.C. § 316(e).

[11] See 351 I.C.C. at 460, App. 91a. Railroad rate bureaus are now governed entirely by the provisions of a new Section 5b of the Act, 49 U.S.C. §5c, added by Section 208 of the Railroad Revitalization and Regulatory Reform Act, 90 Stat. 42 (1976). This statute, it should be noted, expressly prohibits protests by railroad rate bureaus of an independent action of any other railroad. 49 U.S.C. §5c(5)(a)(iii).

5a(2) permits the carriers to enter into agreements with Commission approval establishing rate bureaus for joint consideration and establishment of carrier rates and charges. But the Commission cannot approve any agreements prohibited by Section 5a(6), which protects the right of independent action. As the Commission noted, Section 5a is permissive, and the carriers are not obligated to seek the express immunity from the antitrust laws granted when approval of a rate bureau agreement is obtained from the Commission.[12] But, having done so, they are subject to the conditions and modifications imposed by the Commission under Section 5a(2). Moreover, Section 5a(7) authorized the Commission to modify agreements it has already approved to assure conformity to the standard of Sections 5a(2) and 5a(6).

The petitioning carriers are seeking a narrow interpretation of the scope of the Commission's authority under Section 5a. The carriers seek to limit the I.C.C.'s authority to approval of only procedures for collective ratemaking. They would have the I.C.C. powerless to protect independent action. This limited interpretation is contrary to the plain words of the statute and the Congressional purpose, as the court of appeals correctly held.[13]

The court also correctly held that the Commission has properly harmonized the provisions of Sections 5a and 216(e).[14] Once the Commission found that, even in the absence of evil motivation, the practice of rate bureau protests undermined competition by restricting the right of independent action, it was compelled to act as it did. When Congress enacted Section 5a, and granted a limited immunity from the antitrust laws for carrier rate bureaus, it nonetheless left the antitrust law otherwise entirely applicable to regulated carriers.[15] The I.C.C. has a duty when administering a statute which contains an express immunity from the antitrust laws to consider the policies of the antitrust laws, *McLean Trucking v. United States*, 321 U.S. 67, 77-88 (1944), and to narrowly interpret the scope of any immunity. *Federal Maritime Comm. v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973). These policies reflect the establishment of a "regime of competition as the fundamental principle governing commerce in this country." *City of Lafayette v. Louisiana P. & L. Co., supra*, 46 U.S.L.W. at 4267.[16]

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[12] See Section 5a(9), and 351 I.C.C. at 461, App. 92a.

[13] See 559 F.2d at 1253 and 1255, App. 4a, 6a-7a.

[14] The need for this harmonizing was recognized even by the dissenting judge in the court of appeals. See 559 F.2d at 1256, App. 11a.

The actions of the I.C.C. and the court of appeals are entirely consistent with these legislative policy directions. The limitation of the right of rate bureaus to protest was necessary to protect the right of independent action. If this involved an accommodation with the apparently conflicting provisions of Section 216(e), this is precisely the function of the Interstate Commerce Commission.

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[15] H.R. Report No. 1100 (80th Cong. 1st Sess.) at 5, quoted by Mr. Justice Clark at 559 F.2d 1253, App. 4a.

[16] See also *Gulf States Utilities Co. v. F.P.C.*, 411 U.S. 747, 759 (1973) and *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973).

CONCLUSION

The petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit should be denied. There is no constitutional issue which requires review by this Court. The actions of the Interstate Commerce Commission and the court of appeals correctly applied the provisions of the Interstate Commerce Act which are involved.

Respectfully submitted,

JOHN F. DONELAN
FREDERIC L. WOOD
JOHN K. MASER III

DONELAN, CLEARY, WOOD & MASER
914 Washington Building
Washington, D.C. 20005
(202) 783-1215

Attorneys for Respondent

Dated: April, 1978